130-301

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1888.**

No. 196.

HENRY AMY AND GUSTAVUS L. HOPPENSTEDT, PLAINTIFFS IN ERROR,

*vs.*

THE CITY OF WATERTOWN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

**FILED NOVEMBER 9, 1885.**

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1 *Transcript from the Circuit Court of the United States for the Western District of Wisconsin.*

Supreme Court of the United States.

HENRY AMY and GUSTAVUS L. HOPPENSTEDT, Plaintiffs in Error,

*against*

CITY OF WATERTOWN, Defendant in Error.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judge of the circuit court of the United States for the western district of Wisconsin, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in said circuit court, before you, between Henry Amy and Gustavus Hoppenstedt, plaintiffs, and The City of Watertown, def't, a manifest error hath intervened, to the great damage of the said Henry Amy and Gustavus Hoppenstedt, as by *his* complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment *to* therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, in the District of Columbia, on the 12th day of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 12th day of October, in the year of our Lord one thousand eight hundred and eighty-five.

[Seal U. S. Circuit Court, Western Dist. of Wisconsin.]

F. M. STEWART, *Clerk.*

3 The return of the judges of the circuit court of the United States for the western district of Wisconsin appears by the schedule hereto annexed.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Madison, in said district, this 15th day of October, A. D. 1885, and of our Independence the 110th.

[Seal U. S. Circuit Court, Western Dist. of Wisconsin.]

F. M. STEWART, *Clerk.*

4 UNITED STATES OF AMERICA, } ss:
*Western District of Wisconsin,* }

At a stated term of the circuit court of the United States for the western district of Wisconsin, begun and held at Madison, in said district, on the first Monday, being the 4th day, of June, A. D. 1883—present and presiding, the Honorable Romanzo Bunn, judge—among other the following proceedings were had, to wit:

HENRY AMY and GUSTAVUS L. HOPPENSTEDT, Plaintiffs,
*vs.*
THE CITY OF WATERTOWN, Defendant.

Be it remembered that heretofore, to wit, on the 3d day of March, A. D. 1873, came the above-named plaintiffs, by Finches, Lynde & Miller, their attorneys, and filed præcipe for a summons as follows, viz:

*Præcipe.*

Circuit Court of the U. S., W. District of Wisconsin.

HENRY AMY and GUSTAVUS L. HOPPENSTEDT, Plaintiffs,
*vs.*
THE CITY OF WATERTOWN, Defendant.

5 The clerk will issue a summons for money demand for three thousand three hundred and sixty dollars, together with interest on $120 of that sum from and since January 1, 1858, at seven per cent. per annum, and also with interest on $120.00 of that sum from and since July 1, 1858, at seven per cent. per annum, and also with interest on $120 of that sum from and since January 1, 1859, at 7 per cent. per annum, and also with interest on $120 of that sum from and since July 1, 1859, at seven per cent. per annum, and also with interest on $120 of that sum from and since January 1, 1860, at seven per cent. per annum, and also with interest on $120 of that sum from and since July 1, 1860, at seven per cent. per annum, and also with interest on $120 of that sum from and since January 1, 1861, at seven per cent. per annum, and also with interest on $120 of that sum from and since July 1, 1861, at seven per cent. per annum, and also with interest on $120 of that sum from and since January 1, 1862, at seven per cent. per annum, and also with interest on $120 of that sum from and since July 1, 1862, at seven per cent. per annum, and also with interest on $120 of that sum from and since January 1, 1863, at seven per cent. per annum, and also with interest on $120 of that sum from and since July 1, 1863, at seven per cent. per annum, and also with interest on $120 of that sum from and since January 1, 1864, at 7 per cent. per annum, and also with interest on $120 of that sum from and since July 1, 1864, at seven per cent. per annum, and also with interest on $120 of that sum from and since

January 1, 1865, at seven per cent. per annum, and also with interest on $120 of that sum from and since July 1, 1865, at seven per cent. per annum, and also with interest on $120 of that
6 sum from and since January 1, 1866, at seven per cent. per annum, and also with interest on $120 of that sum from and since July 1, 1866, at seven per cent. per annum, and also with interest on $120 of that sum from and since January 1, 1867, at seven per cent. per annum, and also with interest on $120 of that sum from and since July 1, 1867, at seven per cent. per annum, and also with interest on $120 of that sum from and since January 1, 1868, at seven per cent. per annum, and also with interest on $120 of that sum from and since July 1, 1868, at seven per cent. per annum, and also with interest on $120 of that sum from and since January 1, 1869, at seven per cent. per annum, and also with interest on $120 of that sum from and since July 1, 1869, at seven per cent. per annum, and also with interest on $120 of that sum from and after January 1, 1870, at seven per cent. per annum, and also with interest on $120 of that sum from and since July 1, 1870, at seven per cent. per annum, and also with interest on $120 of that sum from and since January 1, 1871, at seven per cent. per annum, and also with interest on $120 of that sum from and since July 1, 1871, at seven per cent. per annum, together with costs and disbursements, and make the same returnable in accordance with law.

FINCHES, LYNDE & MILLER,
*Pl'ffs' Att'ys.*

And on the same day filed bond for costs as follows, viz:

*Bond.*

Know all men by these presents that Henry Amy and Gustavus L. Hoppenstedt and Benjamin K. Miller are held and firmly
7 bound unto The City of Watertown in the sum of two hundred dollars, to be paid to the said The City of Watertown, executors, administrators, or assigns; to which payment, well and truly to be made and done, we do bind ourselves and our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals the 1st day of March, A. D. 1873.

Whereas an action for money demand is about to be commenced at the suit of Henry Amy and Gustavus L. Hoppenstedt against the said The City of Watertown:

Now, therefore, the condition of this obligation is such that if the plaintiff- will pay all costs that may be awarded against *him* not exceeding the aforesaid sum, then this obligation to be void; else valid.

HENRY AMY, [SEAL.]
GUSTAVUS L. HOPPENSTEDT, [SEAL.]
By FINCHES, LYNDE & MILLER,
*Their Att'ys.*
B. K. MILLER. [SEAL.]

Witness:
SAM. M. DIXON.

WESTERN DISTRICT OF WISCONSIN, *ss:*

Benjamin K. Miller, being sworn, says that he is worth the sum of two hundred dollars exclusive of property exempt from execution and his debts.

B. K. MILLER.

Subscribed and sworn to before me this 1st day of March, A. D. 1873.

SAM. M. DIXON,
*Notary Public, Milwaukee County, Wisconsin.*

Whereupon a summons issued as follows, to wit:

8 *Summons.*

Circuit Court of the United States for the Western District of Wisconsin.

HENRY AMY and GUSTAVUS L. HOPPENSTEDT
*v.*
THE CITY OF WATERTOWN.

Summons for money demand.

The United States of America to the above-named defendant:

You are hereby summoned and required to answer the complaint of Henry Amy and Gustavus L. Hoppenstedt, the plaintiffs in this action, which will be filed in the office of the clerk of this court, at Madison, in said district; and you are also required to file your answer thereto with the clerk of this court, at Madison, and to serve a copy thereof on the attorneys of the plaintiffs, whose names are subscribed hereto, at their office, in Milwaukee, Wisconsin, within twenty days after the service of this summons on you, exclusive of the day of such service, and if you fail to answer the complaint as aforesaid the plaintiffs will take judgment against you for the sum of three thousand three hundred and sixty dollars, together with interest on $120 of said sum from and since January 1, 1858, at seven per cent. per annum; and also with interest on $120 of said sum from and since July 1, 1858, at seven per cent. per annum; and also with interest on $120 of said sum from and since January 1, 1859, at seven per cent. per annum; and also with interest on $120 of said sum from and since July 1, 1859, at seven per cent. per annum; and

9 also with interest on $120 of said sum from and since January 1, 1860, at seven per cent. per annum; and also with interest on $120 of said sum from and since July 1, 1860, at seven per cent. per annum; and also with interest on $120 of said sum from and since January 1, 1861, at seven per cent. per annum; and also with interest on $120 of said sum from and since July 1, 1861, at seven per cent. per annum; and also with interest on $120

of said sum from and since January 1, 1862, at seven per cent. per annum; and also with interest on $120 of said sum from and since July 1, 1862, at seven per cent. per annum; and also with interest on $120 of said sum from and since January 1, 1863, at seven per cent. per annum; and also with interest on $120 of said sum from and since July 1, 1863, at seven per cent per annum; and also with interest on $120 of said sum from and since January 1, 1864, at seven per cent. per annum; and also with interest on $120 of said sum from and since July 1, 1864, at seven per cent. per annum; and also with interest on $120 of said sum from and since January 1, 1865, at seven per cent. per annum; and also with interest on $120 of said sum from and since July 1, 1865, at seven per cent. per annum; and also with interest on $120 of said sum from and since January 1, 1866, at seven per cent. per annum; and also with interest on $120 of said sum from and since July 1, 1866, at seven per cent. per annum; and also with interest on $120 of said sum from and since January 1, 1867, at seven per cent. per annum; and also with interest on $120 of said sum from and since July 1, 1867, at seven per cent. per annum; and also with interest on $120 of said sum from and since January 1, 1868, at seven per cent. per annum; and also with interest on $120 of said sum from and since July 1, 1868, at seven per cent. per annum; and also with interest on $120 of said sum from and since January 1, 1869, at seven per cent. per annum; and also with interest on $120 of said sum from and since July 1, 1869, at seven per cent. per annum; and also with interest on $120 of said sum from and since Jan'y 1, 1870, at seven per cent. per annum; and also with interest on $120 of said sum from and since July 1, 1870, at seven per cent. per annum; and also with interest on $120 of said sum from and since January 1, 1871, at seven per cent. per annum; and also with interest on $120 of said sum from and since July 1, 1871, at seven per cent. per annum, besides the costs of this action.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at Madison, in said western district of Wisconsin, this 3d day of March, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-seventh.

[L. S.] F. M. STEWART, *Clerk.*

FINCHES, LYNDE & MILLER,
*Pl'ffs' Att'ys.*

The service whereof appears by the return of the marshal thereon endorsed as follows, viz:

*Service.*

Served on the within-named The City of Watertown by delivering to August Tauck, city clerk, and Fred. Meyer, city treasurer, of said city of Watertown, each personally a copy of the within summons this March 6, 1873.

F. W. OAKLEY, *Marshal.*

Fees:

| | |
|---|---|
| Service | 4 |
| Copies, 26 fol. | 2 60 |
| Travel | 3 |
| | $9 60 |

11 And came defendant, and on the 25th day of March, 1873, entered a special appearance as follows, to wit:

*Appearance.*

The Circuit Court of the United States for the Western District of Wisconsin.

HENRY AMY and GUSTAVUS L. HOPPENSTEDT, Plaintiffs,
*against*
THE CITY OF WATERTOWN, Defendant.

GENTS: Take notice that I appear as attorney for the defendant in this action for the purpose of making a motion to set aside the service of the summons in said action and for that purpose only.

Yours, &c., HARLOW PEASE,
*Of Watertown, Wisconsin, Defendant's Attorney for the Purpose Above Mentioned Only.*

Dated March 24, 1873.
To Mess. Finches, Lynde & Miller, plaintiffs' attorneys.

And filed at the same time the following affidavits, to wit:

*Affidavit.*

STATE OF WISCONSIN, } ss:
*Jefferson County,* }

The Circuit Court of the United States for the Western District of Wisconsin.

12 HENRY AMY and GUSTAVUS L. HOPPENSTEDT, Plaintiffs,
*against*
THE CITY OF WATERTOWN, Defendant.

August Tauck, being duly sworn, says that he is the city clerk of The City of Watertown, the above-named defendant; that he is not now nor never has been the mayor or acting mayor of said city of Watertown, and that the summons in the above-entitled action was served upon him on the 6th day of March, 1873.

A. TAUCK.

Subscribed and sworn to before me this 25th day of March, 1873.
[SEAL.] ERNEST GRASSMANN,
*Notary Public.*

*Affidavit.*

STATE OF WISCONSIN, } ss:
*Jefferson County,* }

The Circuit Court of the United States for the Western District of Wisconsin.

HENRY AMY and GUSTAVUS L. HOPPENSTEDT, Plaintiffs,

*against*

THE CITY OF WATERTOWN, Defendant.

Fred. Meyer, being duly sworn, says that he is the city
13 treasurer of The City of Watertown, the above-named defendant; that he is not now and never has been the mayor or acting mayor of the said city of Watertown, and that the summons in the above-entitled action was served on him on the 6th day of March, 1873.

F. MEYER.

Subscribed and sworn to before me this 25th day of March, 1873.
[SEAL.] ERNEST GRASSMANN,
*Notary Public.*

And also on said last-named day filed the following notice of motion to set aside service of summons, viz:

*Notice of Motion.*

The Circuit Court of the United States for the Western District of Wisconsin.

HENRY AMY and GUSTAVUS L. HOPPENSTEDT, Plaintiffs,

*vs.*

THE CITY OF WATERTOWN, Defendant.

Take notice that on the 8th day of April, 1873, at the United States court-room, at the city of Madison, in the State of Wisconsin, at the opening of said court on that day, or as soon thereafter as counsel can be heard, I shall move this court to set aside the service of the summons in this action for the following reasons:

1st. That said summons was not served on the mayor of said defendant, The City of Watertown, as required by the charter of said city.

14 2d. That said summons was not served on three residents and freeholders of said city, as provided by the rules of this court.

3d. That said service is irregular and void.

Said motion will be founded on the annexed affidavits and the marshal's return endorsed on said summons.

Yours, &c., HARLOW PEASE,
*Defendant's Attorney for the Purpose of Making said Motion Only.*

Dated March 25th, 1873.

To Messrs. Finches, Lynde & Miller, pl'ffs' att'ys.

Endorsed: Received a copy of within notice of appearance and motion papers this 25th day of March, 1873. Finches, Lynde & Miller, pl'ffs' att'ys.

And came plaintiffs and filed the following affidavit, to wit:

*Affidavit of Marshal.*

WESTERN DISTRICT OF WISCONSIN, *ss:*

U. S. Circuit Court, Western District of Wisconsin

HENRY AMY and GUSTAVUS L. HOPPENSTEDT
*vs.*
THE CITY OF WATERTOWN.

F. W. Oakley, being duly sworn, deposes and says that he
15 is the marshal in and for the western district of Wisconsin; that he served the summons in the above-entitled cause; that at the time of the service of the said summons there was no mayor or acting mayor of the said city of Watertown; that, as deponent has been informed and believes, there has been no mayor or acting mayor of said city since on or about the 14th day of February, 1873; and further saith not.

F. W. OAKLEY, *Marshal.*

Subscribed and sworn — before me this 8th day of March, A. D. 1873.

F. M. STEWART, *Clerk.*

And came said defendant, and on the 10th day of April, 1873, filed the following affidavit, to wit:

*Affidavit.*

STATE OF WISCONSIN, } *ss:*
*Jefferson County,* }

U. S. Circuit Court, Western District of Wisconsin.

HENRY AMY *et al. vs.* THE CITY OF WATERTOWN.

And 5 other cases.

August Tauck, being duly sworn, says that he is the city clerk of The City of Watertown, the defendant in the above-entitled actions;

that he has examined the records of said city and the proceedings of the board of street commissioners of said city for and during the months of January, February, March, and April, 1873, and
16 that from the record of said proceedings it appears that Hon. F. Kusel, mayor of said city, resigned the said office of mayor on the 30th day of January, 1873; that from the 30th day of January, 1873, to the 24th day of February, 1873, Street Commissioner J. T. Maak was the chairman of the board of street commissioners and acting mayor of said city of Watertown; that from the 24th day of February, 1873, to the 17th day of March, 1873, Street Commissioner Judson Prentice was temporary chairman of the board of street commissioners of said city of Watertown and acting mayor of said city of Watertown.

Defendant further says that on the 6th and 8th days of March, 1873, said Judson Prentice was acting mayor of said city of Watertown.

AUGUST TAUCK.

Subscribed and sworn to before me this 10th day of April, 1873.
[SEAL.] ERNEST GRASSMANN,
*Notary Public.*

And in the record and proceedings aforesaid in said entitled cause, on the 8th day of April, 1873, being the — day of the December term, 1872, of said court, appears the following order, to wit:

*Order Setting Aside Service, &c.*

HENRY AMY and GUSTAVUS L. HOPPENSTEDT

*vs.*

THE CITY OF WATERTOWN.

This day came the defendant, by its attorney, Mr. Pease, and moved the court to set aside the service of the summons
17 herein for want of proper service, and it appearing from the return of the marshal endorsed on the summons filed in this case that the summons has not been served upon the defendant in the manner prescribed by law, so as to give the court jurisdiction of the defendant or so as to entertain any motion or proceedings in this case as against said defendant or on its behalf unless it appears, it is ordered by the court that the motion be, and hereby is, denied, and the clerk is hereby authorized to return said summons to the marshal, to be served on the defendant according to law or for such further action as the defendant may direct conformably to law.

And thereafter, to wit, on the 23d day of December, A. D. 1882, came the marshal and made return of service of said summons as follows:

*Service of Summons.*

Served on the within-named The City of Watertown by delivering to Wm. H. Rohr, last mayor of said city; Henry Bieber, city clerk; Chas. H. Gardner, city attorney, and Thomas Baxter, last presiding officer (or president or ch'm'n), of the board of street commissioners of said city of Watertown, each personally a copy of the within summons and by showing each of them this original summons this 23d day of December, 1882, the office of mayor of said city being vacant and there being no president of the common council nor presiding officer thereof in office.

F. W. OAKLEY, *U. S. M.*,
By W. S. MAIN, *Deputy.*

Fees:

| | |
|---|---|
| Service | 8 |
| Copies | 4 80 |
| Travel | 2 40 |
| | $15 20 |

18 And afterwards, to wit, on the 19th day of June, A. D. 1883, came the said plaintiffs, by their attorneys, and filed their complaint herein as follows, viz:

*Complaint.*

19 Circuit Court of the United States, Western District of Wisconsin.

HENRY AMY and GUSTAVUS HOPPENSTEDT, Plaintiffs,
*vs.*
CITY OF WATERTOWN, Defendant.

Henry Amy and Gustavus Hoppenstedt, the two plaintiffs above named, complaining of The City of Water*loo*, the above-named defendant, respectfully show to the court and allege as follows, to wit:

First. That they, the said plaintiffs, were at all the times hereinafter mentioned and still are copartners in trade, doing business under the firm name and style of H. Amy & Co., and that each of said plaintiffs was at all the times hereinafter mentioned and still is a resident & citizen of the city of New York, State of New York.

Second. That the above-named defendant, The City of Watertown, at the time of the issuing of the obligations hereinafter mentioned was and ever since then has been and now is a corporation municipal, duly created and organized under and by virtue of the laws of the State of Wisconsin and existing in said State and under the laws thereof, and that the same was by the laws of said State duly and fully authorized and empowered to issue the obligations hereinafter set forth and to bind itself thereby.

Third. That said defendant, The City of Watertown, on
20 the first day of June, 1856, made, executed under seal, issued and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

"No. 115. UNITED STATES OF AMERICA. $1,000.

STATE OF WISCONSIN, *City of Watertown.*

Issued to aid in the construction of the Watertown and Madison R. R.

Know all men by these presents that the City of Watertown is justly indebted to and promises to pay Wm. B. Hibbard or bearer the sum of one thousand dollars on the first day of Jan'y, A. D. 1877, at the Bank of North America, in the city of New York, together with interest thereon at the rate of eight per cent. per annum, payable semi-annually on presentation and surrender of the annexed interest warrants or coupons at said bank. For the payment of principal and interest the faith and credit of said city of Watertown are inviolably and irrevocably pledged.

This bond is one of a series of two hundred, of the same amount, tenor, and date, issued in conformity with an act of the Legislative Assembly of Wisconsin and ordinances of the city of Watertown.

In witness whereof the common council of the city of Watertown hath hereunto caused to be affixed the corporate seal of said city and these presents to be signed by the mayor and counter-
21 signed by the clerk of the common council of said city this first day of June, A. D. 1856.

[Seal of the City of Watertown, Wisconsin.]

WM. CHAPPELL, *Mayor.*
SAM'L BAIRD, *Clerk.*"

Fourth. That said defendant, The City of Watertown, on the first day of June, 1856, made, executed under seal, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

"No. 40. UNITED STATES OF AMERICA. $1,000.

STATE OF WISCONSIN, *City of Watertown.*

Issued to aid in the construction of the Watertown and Madison R. R.

Know all men by these presents that the City of Watertown is justly indebted to and promises to pay Wm. B. Hibbard or bearer the sum of one thousand dollars on the first day of Jan'y, A. D. 1877, at the Bank of North America, in the city of New York, together with interest thereon at the rate of eight per cent. per

annum, payable semi-annually on presentation and surrender of the annexed interest warrants or coupons at said bank. For the payment of principal and interest the faith and credit of said city of Watertown are inviolably and irrevocably pledged.

This bond is one of a series of two hundred, of the same amount, tenor, and date, issued in conformity with an act of the Legislative Assembly of Wisconsin and ordinances of the city of Watertown.

22 In witness whereof the common council of the city of Watertown hath hereunto caused to be affixed the corporate seal of said city and these presents to be signed by the mayor and countersigned by the clerk of the common council of said city this first day of June, A. D. 1856.

[Seal of the City of Watertown, Wisconsin.]

WM. CHAPPELL, *Mayor.*
SAM'L BAIRD, *Clerk.*"

Fifth. That said defendant, The City of Watertown, on the first day of June, 1856, made, executed under seal, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

"No. 183. UNITED STATES OF AMERICA. $1,000.

STATE OF WISCONSIN, *City of Watertown.*

Issued to aid in the construction of the Watertown and Madison R. R.

Know all men by these presents that the City of Watertown is justly indebted to and promises to pay Wm. B. Hibbard or bearer the sum of one thousand dollars on the first day of Jan'y, A. D. 1877, at the Bank of North America, in the city of New York, together with interest thereon at the rate of eight per cent. per annum, payable semi-annually on presentation and surrender of the annexed interest warrants or coupons at said bank. For the payment

23 of principal and interest the faith and credit of said city of Watertown are inviolably and irrevocably pledged.

This bond is one of a series of two hundred of the same amount, tenor, and date, issued in conformity with an act of the Legislative Assembly of Wisconsin and ordinances of the city of Watertown.

In witness whereof the common council of the city of Watertown hath hereunto caused to be affixed the corporate seal of said city and these presents to be signed by the mayor and countersigned by the clerk of the common council of said city this first day of June, A. D. 1856.

[Seal of the City of Watertown, Wisconsin.]

WM. CHAPPELL, *Mayor.*
SAM'L BAIRD, *Clerk.*"

Sixth. That said defendant, The City of Watertown, on the first day of June, 1856, made, executed under seal, issued and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk and was in the words and figures as follows, to wit:

"No. 25. $1,000.

UNITED STATES OF AMERICA.

STATE OF WISCONSIN, *City of Watertown.*

Issued to aid in the construction of the Watertown and Madison R. R.

Know all men by these presents that the City of Water-
24 town is justly indebted to and promises to pay Wm. B. Hibbard or bearer the sum of one thousand dollars on the first day of Jan'y, A. D. 1877, at the Bank of North America, in the city of New York, together with interest thereon at the rate of eight per cent. per annum, payable semi-annually on presentation and surrender of the annexed interest warrants or coupons at said bank. For the payment of principal and interest the faith and credit of said city of Watertown are inviolably and irrevocably pledged.

This bond is one of a series of two hundred, of the same amount, tenor and date, issued in conformity with an act of the Legislative Assembly of Wisconsin and ordinances of the city of Watertown.

In witness whereof the common council of the city of Watertown hath hereunto caused to be affixed the corporate seal of said city and these presents to be signed by the mayor and countersigned by the clerk of the common council of said city this first day of June, A. D. 1856.

[Seal of the City of Watertown, Wisconsin.]

WM. CHAPPELL, *Mayor.*
SAM'L BAIRD, *Clerk.*"

25 I.

Said plaintiffs further allege, as a first cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1858, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 115, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 115, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon at seven per cent. per annum, from the first day of January, 1858, which said plaintiffs claim and demand judgment therefor.

II.

Said plaintiffs further allege, as a second cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1858, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 115, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 115, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July 1858, which said plaintiffs claim and demand judgment therefor.

26 III.

Said plaintiffs further allege, as a third cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1859, at the Bank of North America, in the city of New York, on presentation hereof, being the

interest due that day on bond of city, No. 115, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 115, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiff's thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1859, which said plaintiffs claim and demand judgment therefor.

IV.

Said plaintiffs further allege, as a fourth cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1859, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 115, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 115, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1859, which said plaintiffs claim and demand judgment therefor.

27 V.

Said plaintiffs further allege, as a fifth cause of action against said defendant, The City of Watertown, as follows, to-wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1860, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 115, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 115, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1860, which said plaintiffs claim and demand judgment therefor.

VI.

Said plaintiffs further allege, as a sixth cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1860, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 115, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 115, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1860, which said plaintiffs claim and demand judgment therefor.

28 VII.

Said plaintiffs further allege, as a seventh cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay,

which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1861, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 115, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 115, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1861, which said plaintiffs claim and demand judgment therefor.

VIII.

Said plaintiffs further allege, as an eighth cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1861, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day of bond of city, No. 115, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 115, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1861, which said plaintiffs claim and demand judgment therefor.

29 IX.

Said plaintiffs further allege, as a ninth cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1862, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 115, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 115, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1862, which said plaintiffs claim and demand judgment therefor.

X.

Said plaintiffs further allege, as a tenth cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1862, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 115, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 115, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1862, which said plaintiffs claim and demand judgment therefor.

30

XI.

Said plaintiffs further allege, as an eleventh cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1863, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 115, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 115, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1863, which said plaintiffs claim and demand judgment therefor.

XII.

Said plaintiffs further allege, as a twelfth cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1863, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 115, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 115, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1863, which said plaintiffs claim and demand judgment therefor.

31 XIII.

Said plaintiffs further allege, as a thirteenth cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1864, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 115, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 115, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1864, which said plaintiffs claim and demand judgment therefor.

XIV.

Said plaintiffs further allege, as a 14th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1864, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 115, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 115, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July 1864, which said plaintiffs claim and demand judgment therefor.

32

XV.

Said plaintiffs further allege, as a 15th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1865, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 115, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 115, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1865, which said plaintiffs claim and demand judgment therefor.

XVI.

Said plaintiffs further allege, as a 16th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1865, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 115, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 115, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1865, which said plaintiffs claim and demand judgment therefor.

33 XVII.

Said plaintiffs further allege, as a 17th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1866, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 115, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 115, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1866, which said plaintiffs claim and demand judgment therefor.

XVIII.

Said plaintiffs further allege, as an 18th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1866, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 115, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 115, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1866, which said plaintiffs claim and demand judgment therefor.

34

XIX.

Said plaintiffs further allege, as a 19th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1867, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 115, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 115, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1867, which said plaintiffs claim and demand judgment therefor.

XX.

Said plaintiffs further allege, as a 20th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1867, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 115, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 115, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1867, which said plaintiffs claim and demand judgment therefor.

35 XXI.

Said plaintiffs further allege, as a 21st cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1868, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 115, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 115, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1868, which said plaintiffs claim and demand judgment therefor.

XXII.

Said plaintiffs further allege, as a 22nd cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1868, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 115, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 115, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1868, which said plaintiffs claim and demand judgment therefor.

36 XXIII.

Said plaintiffs further allege, as a 23d cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1869, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 115, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 115, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1869, which said plaintiffs claim and demand judgment therefor.

XXIV.

Said plaintiffs further allege, as a 24th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1869, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day of bond of city, No. 115, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 115, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1869, which said plaintiffs claim and demand judgment therefor.

37 XXV.

Said plaintiffs further allege, as a 25th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1870, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 115, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 115, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1870, which said plaintiffs claim and demand judgment therefor.

XXVI.

Said plaintiffs further allege, as a 26th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1870, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 115, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 115, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1870, which said plaintiffs claim and demand judgment therefor.

38

XXVII.

Said plaintiffs further allege, as a 27th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1871, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 115, issued to aid the Watertown and Madison railroad.

WM. CHAPIN, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 115, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1871, which said plaintiffs claim and demand judgment therefor.

XXVIII.

Said plaintiffs further allege, as a 28th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1871, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 115, issued to aid the Watertown and Madison railroad.

WM. CHAPIN, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 115, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1871, which said plaintiffs claim and demand judgment therefor.

39 XXIX.

Said plaintiffs further allege, as a 29th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1858, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 25, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 25, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1858, which said plaintiffs claim and demand judgment therefor.

XXX.

Said plaintiffs further allege, as a 30th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1858, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 183, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 183, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1858, which said plaintiffs claim and demand judgment therefor.

40

XXXI.

Said plaintiffs further allege, as a 31st cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1859, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 183, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 183, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1859, which said plaintiffs claim and demand judgment therefor.

XXXII.

Said plaintiffs further allege, as a 32d cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1859, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 183, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 182, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1859, which said plaintiffs claim and demand judgment therefor.

41 XXXIII.

Said plaintiffs further allege, as a 33rd cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1860, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 183, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 183, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1860, which said plaintiffs claim and demand judgment therefor.

XXXIV.

Said plaintiffs further allege, as an 34th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1860, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 183, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 183, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1860, which said plaintiffs claim and demand judgment therefor.

42 XXXV.

Said plaintiffs further allege, as a 35th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1861, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 183, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 183, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1861, which said plaintiffs claim and demand judgment therefor.

XXXVI.

Said plaintiffs further allege, as a 36th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1861, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 183, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 183, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1861, which said plaintiffs claim and demand judgment therefor.

43 XXXVII.

Said plaintiffs further allege, as a 37th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1862, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 183, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 183, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1862, which said plaintiffs claim and demand judgment therefor.

XXXVIII.

Said plaintiffs further allege, as a 38th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1862, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 183, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 183, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1862, which said plaintiffs claim and demand judgment therefor.

44 XXXIX.

Said plaintiffs further allege, as a 39th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1863, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 183, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 183, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1883, which said plaintiffs claim and demand judgment therefor.

XL.

Said plaintiffs further allege, as a 40th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1863, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day of bond of city, No. 183, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 183, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1863, which said plaintiffs claim and demand judgment therefor.

45

41.

Said plaintiffs further allege, as a 41st cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1864, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 183, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 183, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1864, which said plaintiffs claim and demand judgment therefor.

42.

Said plaintiffs further allege, as a 42nd cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1864, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 183, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 183, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1864, which said plaintiffs claim and demand judgment therefor.

46

43.

Said plaintiffs further allege, as a 43rd cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1865, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 183, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 183, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1865, which said plaintiffs claim and demand judgment therefor.

44.

Said plaintiffs further allege, as a 44th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1865, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 183, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 183, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1865, which said plaintiffs claim and demand judgment therefor.

47

45.

Said plaintiffs further allege, as a 45th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1866, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 183, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 183, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1866, which said plaintiffs claim and demand judgment therefor.

46.

Said plaintiffs further allege, as a 46th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1866, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 183, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 183, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1866, which said plaintiffs claim and demand judgment therefor.

48

47.

Said plaintiffs further allege, as a 47th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1867, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 183, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 183, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1867, which said plaintiffs claim and demand judgment therefor.

48.

Said plaintiffs further allege, as a 48th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1867, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 183, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 183, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1867, which said plaintiffs claim and demand judgment therefor.

49 49.

Said plaintiffs further allege, as a 49th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1868, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 183, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 183, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1868, which said plaintiffs claim and demand judgment therefor.

50.

Said plaintiffs further allege, as an 50th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1868, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 183, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 183, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1868, which said plaintiffs claim and demand judgment therefor.

50

51.

Said plaintiffs further allege, as a 51st cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1869, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 183, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 183, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1869, which said plaintiffs claim and demand judgment therefor.

52.

Said plaintiffs further allege, as a 52nd cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1869, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 183, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 183, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1869, which said plaintiffs claim and demand judgment therefor.

51

53.

Said plaintiffs further allege, as a 53d cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1870, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 183, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 183, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1870, which said plaintiffs claim and demand judgment therefor.

54.

Said plaintiffs further allege, as a 54th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1870, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 183, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 183, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1870, which said plaintiffs claim and demand judgment therefor.

52

55.

Said plaintiffs further allege, as a 55th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1871, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 183, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 183, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1871, which said plaintiffs claim and demand judgment therefor.

56.

Said plaintiffs further allege, as a 56th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1871, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day of bond of city, No. 183, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 183, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1871, which said plaintiffs claim and demand judgment therefor.

53

57.

Said plaintiffs further allege, as a 57th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1858, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 40, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 40, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1858, which said plaintiffs claim and demand judgment therefor.

58.

Said plaintiffs further allege, as a 58th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1858, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 40, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 40, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1858, which said plaintiffs claim and demand judgment therefor.

54

59.

Said plaintiffs further allege, as a 59th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1859, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 40, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 40, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1859, which said plaintiffs claim and demand judgment therefor.

60.

Said plaintiffs further allege, as a 60th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1859, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 40, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 40, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1859, which said plaintiffs claim and demand judgment therefor.

55

61.

Said plaintiffs further allege, as a 61st cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1860, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 40, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 40, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1860, which said plaintiffs claim and demand judgment therefor.

62.

Said plaintiffs further allege, as a 62nd cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1860, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 40, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 40, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1860, which said plaintiffs claim and demand judgment therefor.

56

63.

Said plaintiffs further allege, as a 63rd cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1861, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 40, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 40, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1861, which said plaintiffs claim and demand judgment therefor.

64.

Said plaintiffs further allege, as a 64th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1861, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 40, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 40, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1861, which said plaintiffs claim and demand judgment therefor.

57

65.

Said plaintiffs further allege, as a 65th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1862, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 40, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 40, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1862, which said plaintiffs claim and demand judgment therefor.

66.

Said plaintiffs further allege, as a 66th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1862, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 40, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 40, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1862, which said plaintiffs claim and demand judgment therefor.

58 67th.

Said plaintiffs further allege, as a 67th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1863, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 40, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 40, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1863, which said plaintiffs claim and demand judgment therefor.

68.

Said plaintiffs further allege, as a 68th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1863, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 40, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 40, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1863, which said plaintiffs claim and demand judgment therefor.

59

69.

Said plaintiffs further allege, as a 69th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1864, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 40, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 40, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1864, which said plaintiffs claim and demand judgment therefor.

70.

Said plaintiffs further allege, as a 70th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1864, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 40, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 40, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1864, which said plaintiffs claim and demand judgment therefor.

60

71.

Said plaintiffs further allege, as a 71st cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1865, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 40, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 40, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1865, which said plaintiffs claim and demand judgment therefor.

72.

Said plaintiffs further allege, as a 72nd cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1865, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day of bond on city, No. 40, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 40, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1865, which said plaintiffs claim and demand judgment therefor.

61

73.

Said plaintiffs further allege, as a 73d cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1866, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 40, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 40, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1866, which said plaintiffs claim and demand judgment therefor.

74.

Said plaintiffs further allege, as a 74th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1866, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 40, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 40, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1866, which said plaintiffs claim and demand judgment therefor.

62

75th.

Said plaintiffs further allege, as a 75th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1867, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 40, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 40, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1867, which said plaintiffs claim and demand judgment therefor.

76th.

Said plaintiffs further allege, as a 76th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1867, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 40, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 40, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1867, which said plaintiffs claim and demand judgment therefor.

63

77.

Said plaintiffs further allege, as a 77th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1868, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 40, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 40, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1868, which said plaintiffs claim and demand judgment therefor.

78.

Said plaintiffs further allege, as a 78th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1868, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 40, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 40, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1868, which said plaintiffs claim and demand judgment therefor.

64

79.

Said plaintiffs further allege, as a 79th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1869, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 40, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 40, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1869, which said plaintiffs claim and demand judgment therefor.

80.

Said plaintiffs further allege, as an 80th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1869, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 40, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 40, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1869, which said plaintiffs claim and demand judgment therefor.

65 81.

Said plaintiffs further allege, as an 81st cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1870, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 40, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 40, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1870, which said plaintiffs claim and demand judgment therefor.

82.

Said plaintiffs further allege, as an 82nd cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1870, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 40, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 40, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1870, which said plaintiffs claim and demand judgment therefor.

66

83.

Said plaintiffs further allege, as an 83rd cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1871, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 40, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 40, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1871, which said plaintiffs claim and demand judgment therefor.

84.

Said plaintiffs further allege, as an 84th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1871, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 40, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 40, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1871, which said plaintiffs claim and demand judgment therefor.

67 Wherefore said plaintiffs demand judgment against said defendant as follows, to wit:

For $40, with interest at 7 per ct. from January 1st, 1858.
" " " July " 1858.
" " " January " 1859.
" " " July " 1859.
" " " January " 1860.
" " " July " 1860.
" " " January " 1861.
" " " July " 1861.
" " " January " 1862.
" " " July " 1862.
" " " January " 1863.
" " " July " 1863.
" " " January " 1864.
" " " July " 1864.
" " " January " 1865.
" " " July " 1865.
" " " January " 1866.
" " " July " 1866.
" " " January " 1867.
" " " July " 1867.
" " " January " 1868.
" " " July " 1868.
" " " January " 1869.
" " " July " 1869.
" " " January " 1870.
" " " July " 1870.
" " " January " 1871.
" " " July " 1871.

68 For $40, with interest at 7 per ct. from January 1st, 1858.
" " " July " 1858.

For $40, with interest at 7 per ct. from January 1st, 1859.
" " " July " 1859.
" " " January " 1860.
" " " July " 1860.
" " " January " 1861.
" " " July " 1861.
" " " January " 1862.
" " " July " 1862.
" " " January " 1863.
" " " July " 1863.
" " " January " 1864.
" " " July " 1864.
" " " January " 1865.
" " " July " 1865.
" " " January " 1866.
" " " July " 1866.
" " " January " 1867.
" " " July " 1867.

For $40, with interest at 7 per ct. from January 1st, 1868.
" " " July " 1868.
" " " January " 1869.
" " " July " 1869.
" " " January " 1870.
" " " July " 1870.
" " " January " 1871.
" " " July " 1871.

69 And on the same day the said plaintiffs also filed affidavit of no answer, &c., as follows:

*Affidavit of No Answer.*

STATE OF WISCONSIN, }
*County of Milwaukee,* } *ss:*

Circuit Court of the United States, Western District of Wisconsin.

HENRY AMY and GUSTAVUS L. HOPPENSTEDT, Plaintiffs,
*vs.*
THE CITY OF WATERTOWN, Defendant.

Benjamin K. Miller, being duly sworn, says he is a member of the firm of Finches, Lynde & Miller, and has had personal charge of the above-entitled cause; that said firm of Finches, Lynde & Miller is the attorney for the plaintiffs in the above-entitled cause; that neither the said law firm nor any member thereof has received any answer or demurrer from the above defendant, and that the above defendant has not appeared in this action.

B. K. MILLER.

Subscribed and sworn to before me this 19th day of June, 1883.
[SEAL.] GEO. P. MILLER,
*Notary Public, Wisconsin.*

And thereupon came the clerk to whom it was referred and made report of damages herein as follows:

*Report of Damages.*

70 Circuit Court of the United States for the Western District of Wisconsin.

HENRY AMY and GUSTAVUS L. HOPPENSTEDT
*vs.*
CITY OF WATERTOWN.

I, F. M. Stewart, clerk of the circuit court of the United States of America for the western district of Wisconsin, do hereby report

that, in pursuance of an order of this court referring to me to ascertain and report the amount due the plaintiff-, I have assessed the damages to the plaintiff- at the sum of seven thousand seven hundred sixty-two dollars and forty-four cents.

Damages, $7,762.44.

Dated June 19, 1883.

F. M. STEWART, *Clerk.*

And in said record of proceedings aforesaid in said entitled cause, on said 19th day of June, A. D. 1883, being the 14th day of said June term, 1883, of said court, there appears the following entry, to wit:

*Judgment.*

HENRY AMY and GUSTAVUS L. HOPPENSTEDT, Plaintiffs,

*against*

THE CITY OF WATERTOWN, Defendant.

This day came the plaintiffs, by their attorneys, and on
71 their motion it is ordered by the court that the default of the defendant, City of Watertown, be, and is hereby, entered for its not appearing and answering to the plaintiffs' complaint, and that it be referred to the clerk to ascertain and report what sum the plaintiffs ought to recover for their damages.

The clerk reported in writing that he assessed the damages to the said plaintiffs at the sum of seven thousand seven hundred and sixty-two dollars and forty-four cents.

Whereupon it is considered and adjudged by the court now here that said plaintiffs do have and recover of said defendant, The City of Watertown, the said sum of seven thousand seven hundred and sixty-two dollars and forty-four cents damages, with forty-nine dollars and seventy cents, their costs about their said suit in this behalf by them expended, and that they have execution therefor.

Judgment-roll signed June 19, 1883.

F. M. STEWART, *Clerk.*

| | |
|---|---|
| Damages | $7,762 44 |
| Costs | 49 70 |
| | $7,812 14 |

And thereafter, to wit, on the 27th day of July, A. D. 1883, came the above-named defendant, by its attorneys, Geo. W. Bird and D. Hall, and filed special appearance as follows, viz:

*Appearance.*

Circuit Court of the United States for the Western District of Wisconsin.

HENRY AMY and GUSTAVUS L. HOPPENSTEDT, Plaintiffs,

*against*

72 THE CITY OF WATERTOWN, Defendant.

To Messrs. Finches, Lynde & Miller, plaintiffs' attorneys:

Please take notice that we, the undersigned, appear specially for the defendant, The City of Watertown, in the above-entitled action for the sole and only purpose of making the motion, the notice of which is hereto annexed, upon the grounds therein in said notice stated, and we hereby restrict this our appearance to that purpose only.

Yours, &c., GEO. W. BIRD.
DANIEL HALL.

P. O. address, Watertown, Jefferson Co., Wis.

Dated July 24, 1883.

And also filed the following notice of motion, viz:

*Notice of Motion.*

In the Circuit Court of the United States for the Western District of Wisconsin.

HENRY AMY and GUSTAVUS L. HOPPENSTEDT, Plaintiffs,

*vs.*

THE CITY OF WATERTOWN, Defendant.

To Messrs. Finches, Lynde & Miller, plaintiffs' attorneys.

73 GENTLEMEN: Please to take notice that upon the affidavits hereto attached and the marshal's returns attached to and endorsed upon the summons herein, and upon the judgment now on file in said action, the above-named defendant, The City of Watertown, will move said court, at the United States court-room, at the city of Madison, Dane county, Wisconsin, on the 28th day of August, 1883, at two (2) o'clock in the afternoon, or as soon thereafter as counsel can be heard, to set aside the said judgment and the alleged and pretended service of said summons herein upon the sole and only ground that there has been no service of the summons in said action upon said defendant, and that said court has no jurisdiction of said defendant.

The said defendant hereby limits and restricts its appearance

herein to the sole and only purpose of making said motion upon the grounds aforesaid.

Yours, &c.,

GEO. W. BIRD,
DANIEL HALL,

*Attorneys, Appearing Specially for said Defendant for the Sole and Only Purpose of Making said Motion upon the Ground Aforesaid and Hereby Restricting Their Appearance to that Purpose Only.*

P. O. address, Watertown, Jeff. Co., Wis.

Dated Watertown, Wis., July 24, 1883.

And at same time also filed the following affidavit, viz:

74 *Affidavit of Henry Bieber.*

WESTERN DISTRICT OF WISCONSIN, *ss:*

In Circuit Court of the United States for Western District of Wisconsin.

HENRY AMY and GUSTAVUS L. HOPPENSTEDT, Plaintiffs,
*vs.*
THE CITY WATERTOWN, Defendant.

Henry Bieber, being duly sworn, deposes and says that he resides in the city of Watertown, in said western district of Wisconsin, and is the Henry Bieber named and referred to in the marshal's return endorsed upon and attached to the summons on file in the above-entitled action in the office of the clerk of said court, at Madison, Wisconsin, and that ever since the 1st day of April, 1882, down to the 7th day of April, 1883, and ever since the 9th day of April, 1883, he has been and was and is the city clerk of the City of Watertown, the defendant in the above-entitled action, and as such city clerk has been during all of said time and is the clerk of the board of street commissioners of the said defendant, The City of Watertown.

And this affiant further deposes and says that at the annual election for city and ward officers held in and for said city on the 4th day of April, 1882, the said Thomas Baxter named in and referred to in said return of service of said summons was duly elected and on the 10th day of April, 1882, duly qualified as senior alderman of said city in and for the 3d ward thereof and thereby became and, until the 7th day of April, 1883, continued to be a member of the board of street commissioners of the said defendant, The City of Watertown.

75 And this affiant further deposes and says that in the month of November, 1882, there was one and only one meeting of the said board of street commissioners of said defendant, which meeting was held on the 11th day of November, 1882; that no mayor of said city and no chairman elected by said board of street commissioners to preside at its meetings in the mayor's absence was present at said meeting; that William Voss, the senior alderman of

said city in and for the 6th ward thereof and a member of said board, was then, by a *viva voce* vote, chosen by the members of said board present at said meeting chairman *pro tempore* to preside at that particular meeting held on said 11th day of November, 1882, which said meeting, after the transaction of its business, adjourned on said 11th day of November, A. D. 1882.

And this affiant further deposes and says that in the month of December, 1882, there were three and only three meetings of the board of street commissioners of said defendant, The City of Watertown, to wit, a regular meeting thereof held on the 4th day of December, 1882; a regular meeting thereof held on the 18th day of December, 1882, and a special meeting thereof held on the 27th day of December, 1882, and that no other meeting or meetings of said board was held at any time during said month of December, 1882, and that this affiant was present at each and all of said meetings.

And this affiant further deposes and says that at said meeting of said board of street commissioners held on the said 4th day of December, 1882, the said Thomas Baxter was present and a member of said board; that no mayor of said city and no chairman elected
76 by said board of street commissioners to preside at its meetings in the mayor's absence was present at said meeting of said board held on said 4th day of December, 1882, and that for that reason the said Thomas Baxter was, on motion, chosen, by a *viva voce* vote of the members of said board present at said meeting, chairman *pro tempore* to preside temporarily at that particular meeting of said board held on said 4th day of December, 1882, and for no other purpose whatever, and that after the transaction of its business at the meeting last named the said board of street commissioners then, on said 4th day of December, 1882, adjourned *sine die*, and that said Baxter, upon said adjournment, then at once ceased to be said temporary chairman or presiding officer of said board of street commissioners.

And this affiant further deposes and says that at the meeting of said board of street commissioners held as aforesaid on the said 18th day of December, 1882, there was no quorum present, and for that reason said board adjourned on said 18th day of December, 1882, without the transaction of any other business.

And this affiant further deposes and says that at said special meeting of said board of street commissioners held on said 27th day of December, 1882, this affiant was present; that no mayor of said city or chairman elected by said board of street commissioners to preside at its meetings in the mayor's absence was present at said meeting of said board held on said 27th day of December, 1882, and that for that reason the said Thomas Baxter was, on motion, chosen, by a *viva voce* vote of the members of said board present at
77 said last-named meeting, chairman *pro tempore* to preside temporarily, and for the sole and only purpose of presiding temporarily, at said particular special meeting of said board of street commissioners held on said 27th day of December, 1882, and that after the transaction of its business the said board, on said 27th day of December, 1882, adjourned its said special meeting *sine die*, and

that said Baxter, upon said adjournment, at once ceased to be said temporary chairman or presiding officer of said board.

And this affiant further deposes and says that no meeting of any kind of said board of street commissioners of said city was held at any time after said last above named special meeting of December 27, 1882, until the 15th of January, 1883.

And this affiant further deposes and says that during said Baxter's said term of office of senior alderman of said city, besides said two instances in the month of December, 1882, he was, when no mayor of said city nor chairman elected by said board to preside at its meetings in the mayor's absence was present, alternated with other members of said board in being chosen in the same manner as on said 4th and said 27th days of December, 1882, to preside merely temporarily during the particular meeting of said board of street commissioners at which he was so chosen, but that he was not chosen to preside and did not preside at said meetings of said board held as aforesaid on said 18th day of December, 1882, and was not in any manner chairman thereof at said last-named meeting.

And this affiant further deposes and says that the said board of street commissioners of said city of Watertown never at any time elected, chose, or appointed the said Thomas Baxter chair-
78 man of the said board of street commissioners of said city of Watertown or chairman to preside or who should preside at its meetings in the mayor's absence, and that the said Thomas Baxter was not, on the 23d day of December 1882, or at any other time the chairman of the board of street commissioners of the said city of Watertown or the presiding officer thereof, or a chairman elected by said board to preside or who should preside at the meetings of said board in the mayor's absence, and that the said Thomas Baxter has never been elected, chosen, or appointed chairman of said board of street commissioners, or presiding officer thereof, or a chairman to preside or who should preside at its meetings in the mayor's absence save and except only as he has so as aforesaid been chosen chairman *pro tempore* for the sole and only purpose of presiding temporarily at each particular one of the said meetings at which he has been so chosen as aforesaid chairman *pro tempore* and for no other purpose.

And this affiant further deposes and says that Charles H. Gardner named and referred to in said returns was not, on said 23d day of December, 1882, or at any other time, the attorney for the said defendant in this action and was not authorized by this defendant to appear for it in this action or to accept, admit, or receive service of summons upon it or for it in said action.

And this affiant further deposes and says that no copy of the summons in this action has ever been delivered to the mayor of the said defendant, The City of Watertown, and no summons herein has ever been served upon said city or the mayor thereof, and that nothing has ever been done toward or by way of the service
79 of the summons herein upon the said defendant, except that on the 23d day of December, 1882, four copies thereof were

delivered as follows, to wit: One to this affiant, one to said Thomas Baxter, one to the said Charles H. Gardner, and one to Wm. H. Rohr; that said Rohr was not, on said 23d day of December, 1882, mayor of the said defendant or acting mayor or president of the common council thereof and had not been since the 10th day of April, 1882, and except one copy each was delivered March 6, 1873, to one Tauck and one Meyer, neither of whom was mayor of said defendant or acting mayor or president of the common council thereof, and that the said defendant has never, up to the date of this affidavit, in any manner appeared in this action except specially to set aside a pretended service held by the court to be no service, nor has any complaint or declaration in this action ever been served upon the said defendant in any manner whatever.

HENRY BIEBER.

Subscribed & sworn to before me this 23d day of July, A. D. 1883.

C. B. SKINNER,

*U. S. Court Commissioner for Western Dist. of Wisconsin.*

And also filed the following affidavit, to wit:

*Affidavit.*

WESTERN DISTRICT OF WISCONSIN, *ss:*

Circuit Court of the United States for the Western District of Wisconsin.

HENRY AMY and GUSTAVUS L. HOPPENSTEDT, Plaintiffs,

*vs.*

THE CITY OF WATERTOWN, Defendant.

80 Thomas Baxter, being duly sworn, on oath doth depose and say that he resides in the 3d ward of the city of Watertown in the said western district of Wisconsin, and that he is the Thomas Baxter and the only Thomas Baxter named and referred to in the marshal's return of service endorsed on and attached to the summons in the above-entitled action, which summons and return of service are now on file therein.

That at the annual election for city and ward officers held in and for said city of Watertown on the 4th day of April, 1882, this affiant was duly elected a senior alderman of said city, in and for the Third ward thereof, and that on the 10th day of April, 1882, he duly qualified and entered upon the duties of said office, and thereby became, and until the 7th day of April, 1883, continued to be, a member of the board of street commissioners of said defendant, The City of Watertown.

This affiant further deposes and says that in the month of November, 1882, there was one and only one meeting of the said board of street commissioners of said defendant, which meeting was held on the 11th day of November, 1882, and at which meeting this affiant

was present; and, there being no mayor or chairman elected by said board of street commissioners to preside in the mayor's absence present at said meeting, Wm. F. Voss, a senior alderman of said city, in and for the 6th ward thereof, was then, on motion, by a *viva voce* vote, chosen by the members of said board present chairman *pro tempore* to preside at that particular meeting, which, after the transaction of its business, adjourned on said 11th day of November, 1882.

And this affiant further deposes and says that in the month of December, 1882, there were three and only three meetings of
81 the board of street commissioners of the said defendant, The City of Watertown, to wit, a regular meeting thereof on the 4th day of December, 1882; a regular meeting on the 18th day of December, 1882, and a special meeting thereof on the 27th day of December, 1882, and that no other meeting or meetings of said board were held at any time during the said month of December, 1882.

And this affiant further deposes and says that at said meeting of said board of street commissioners held on said 4th day of December, 1882, this affiant and the said William F. Voss were both present and members of said board, and that no mayor of said city and no chairman is elected by said board of street commissioners to preside at its meetings in the mayor's absence was present at said last-named meeting of said board, and that for that reason this affiant, on motion, was chosen, by a *viva voce* vote of the members present, to preside, and for the sole and only purpose of presiding temporarily at that particular last-named meeting of said board of street commissioners, and that after the transaction of its business at the meeting last aforesaid the said board of street commissioners then, on said 4th day of December, 1882, adjourned *sine die*, and that with said last aforesaid adjournment of said board this affiant at once ceased to be such temporary chairman or presiding officer thereof.

And this affiant further deposes and says that at the meeting of said board of street commissioners held as aforesaid on the said 18th day of December, 1882, there was no quorum present, and said board for that reason, on said 18th day of December, 1882, adjourned without the transaction of any other business.

And this affiant further deposes and says that at said special meeting of said board of street commissioners held on the
82 27th day of December, 1882, this affiant was present, and that no mayor of said city or chairman elected by said board of street commissioners to preside at their meetings in the mayor's absence was present thereat, and that for that reason this affiant was chosen, on motion, by a *viva voce* vote of the members of said board present, to preside, and for the sole and only purpose of presiding temporarily at said particular special meeting of the said board of street commissioners, and that after the transaction of its business the said board, on said 27th day of December, 1882, adjourned its said special meeting *sine die*, and that with said adjournment last aforesaid, on the day and year last aforesaid, this affiant at once ceased to be such presiding officer or chairman of

said board of street commissioners, and that no other meeting of any kind of said board of street commissioners of said city was held at any time after said last above named special meeting until the 15th day of January, 1883.

And this affiant further deposes and says that during his said term of office of senior alderman of said city, besides said two instances in the month of December, 1882, he has, when no mayor or chairman elected by said board to preside at its meetings in the mayor's absence was present, alternated with other members of said board in being chosen in the same manner as on said 4th and said 27th days of December, 1882, to preside merely temporarily during the particular meeting of said board of street commissioners at which he was so chosen, but that he was not chosen to preside and did not preside at said meeting of said board held as aforesaid on said 18th day of December, 1882, and was not in any manner chairman thereof at said last-named meeting.

83 And this affiant further deposes and says that no service of said summons on him in the above-entitled action was ever made at any time or place or in any manner, except that the said marshal delivered to this affiant, at his residence in the said 3d ward of said city of Watertown, on the 23d day of December, 1882, and at no other time or place whatever, a copy of said summons; that said board of street commissioners of said city did not have or hold any meeting at the time or on the day on which such service on this affiant was made; that this affiant was not at the time or on the day on which such service of said summons was made on him chairman or acting chairman of said board of street commissioners of said city, nor mayor nor acting mayor of said city, nor president of the common council thereof; that this affiant has never been elected by said board of street commissioners chairman to preside at its meetings in the mayor's absence, and that he has never acted as such chairman thereof, and that this affiant was not at any time during the month of December, 1882, and never has been mayor or acting mayor or president of the common council of said city.

And this affiant further deposes and says that, except his said presiding temporarily during said particular regular meeting of said board of street commissioners held on the 4th day of December, 1882, and during said particular special meeting thereof held on the 27th day of December, 1882, as aforesaid, he at no time in or during said month of December, 1882, was or acted as chairman or president or presiding officer of said board of street commissioners of said defendant, The City of Watertown.

84 And this affiant further deposes and says that he never was at any time chairman or president or presiding officer of the said board of street commissioners of the said defendant, The City of Watertown, and never acted as such chairman or president or presiding officer at any time or in any manner, save and except only as he was chosen to preside temporarily, as hereinbefore stated, at the said particular meetings of said board at which he was so chosen to preside temporarily, as hereinabove stated.

THOS. BAXTER.

Subscribed & sworn to before me this 2d day of July, A. D. 1883.

C. B. SKINNER,
*U. S. Court Commissioner for Western Dist. of Wis.*

And filed also the following affidavit, to wit:

*Affidavit.*

WESTERN DISTRICT OF WISCONSIN, *ss:*

Circuit Court of the United States for the Western District of Wisconsin.

HENRY AMY and GUSTAVUS L. HOPPENSTEDT, Plaintiffs,
*vs.*
THE CITY OF WATERTOWN, Defendant.

William H. Rohr, being duly sworn, on oath doth depose and say that he resides in the city of Watertown, in said western dis-
85 trict of Wisconsin, and that he is the William H. Rohr mentioned and referred to in the marshal's return indorsed upon and attached to the summons in the above-entitled action, now on file therein.

And this affiant further deposes and says that on the 4th day of April, 1882, he was elected mayor of The City of Watertown, the defendant in the above-entitled action, and that he duly qualified and entered upon the duties of said office.

And this affiant further deposes and says that after he had so duly qualified and entered upon the duties of said office he, on the 10th day of April, A. D. 1882, duly resigned in writing the said office of mayor of the said defendant, The City of Watertown, and then, on the 10th day of December, A. D. 1882, he duly delivered to and filed with the city clerk of the said defendant his, affiant's, resignation of the said office of mayor of the said defendant, which said resignation of the said office was in writing and duly directed to the common council of the said defendant, and that the city clerk of the said defendant, then on the said 10th day of April, A. D. 1882, received and duly filed affiant's said resignation of said office of mayor of the said defendant, The City of Watertown, and said resignation took effect from the time of filing the same on the said 10th day of April, 1882.

And this affiant further deposes and says that he was not at any time on the 23d day of December, 1882, mayor of the said defendant, The City of Watertown, or acting mayor thereof or president of the common council thereof, and that he has not been such mayor,
86 acting mayor, or president at any time since the 10th day of April, 1882.

WM. H. ROHR.

Subscribed and sworn to this 24th day of July, A. D. 1883, before me—

C. B. SKINNER,
*U. S. Court Commissioner for Western Dist. of Wis.*

Endorsed: Service of the within notices and affidavits admitted this 27th day of July, 1883. Finches, Lynde & Miller, pl'ffs' att'ys.

And thereafter, to wit, in the December special term, 1883, of said court and on the 79th day of said term, to wit, on the 16th day of May, A. D. 1884, in the record of proceedings aforesaid in said entitled cause appears the following order, to wit:

*Order Setting Aside Judgment.*

HENRY AMY and GUSTAVUS L. HOPPENSTEDT, Plaintiffs,

*vs.*

THE CITY OF WATERTOWN, Defendant.

This cause came on to be heard upon the affidavits and upon the return of the summons and the records, proceedings, and papers on file herein and was argued by counsel; and the court being fully advised of and concerning the same, it is ordered that the
87 judgment heretofore entered herein on the 19th day of June, A. D. 1883, in favor of said plaintiffs and against said defendant, The City of Watertown, be, and the same is hereby, vacated and set aside on the ground that the summons herein was not properly served on said defendant and the court had no jurisdiction thereof.

By the court:

R. BUNN, *Judge.*

88 Supreme Court of the United States.

HENRY AMY and GUSTAVUS HOPPENSTEDT, Plaintiffs in Error,

*vs.*

CITY OF WATERTOWN, Defendant in Error.

Know all men by these presents that we, Benjamin K. Miller & William H. Miller, are held and firmly bound unto The City of Watertown in the full and just sum of five hundred dollars, to be paid to the said City of Watertown, its successors or assigns; to which payment, well and truly to be made and done, we do bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 15th day of October, A. D. 1885.

Whereas the above-named Henry Amy and Gustavus Hoppenstedt have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the western district of Wisconsin:

Now, therefore, the condition of this obligation is such that if the said Henry Amy and Gustavus Hoppenstedt shall prosecute their said writ of error to effect and answer the damages and costs thay

may be assessed against them if they shall fail to make good
89 their said plea, then this obligation to be void; otherwise valid.

B. K. MILLER. [SEAL.]
W. H. MILLER. [SEAL.]

90 UNITED STATES OF AMERICA, *ss:*

To the City of Watertown, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America to be holden at Washington, in the District of Columbia, on the second Monday, being the 12th day, of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Wisconsin, wherein Henry Amy and Gustavus Hoppenstedt are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Madison, in said district, this 12th day of October, in the year of our Lord one thousand eight hundred and eighty-five.

R. BUNN,
*Dist. Judge.*

*I* accept service of above citation this 15th day of October, 1885.

GEO. W. BIRD,
DANIEL HALL,
*Attorneys for Defendant in Error, The City of Watertown.*

91 UNITED STATES OF AMERICA, } *ss:*
*Western District of Wisconsin,* }

I, F. M. Stewart, clerk of the district court of the United States of America for the western district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate with the originals now in my custody and they are true copies of their respective originals and are correct transcripts therefrom and of the whole thereof now on file and remaining of record in my office, and also original writ, citation, and security on writ of error in above cause.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Madison, in the said western district of Wisconsin, this 12th day of October, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the said United States the 110th.

[Seal U. S. Circuit Court, Western Dist. of Wisconsin.]

F. M. STEWART, *Clerk.*

92 THE UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the judges of the circuit court of the United States for the western district of Wisconsin, Greeting:

Whereas in a certain suit in said circuit court between Henry Amy and Gustavus L. Hoppenstedt, plaintiffs, and The City of Watertown, defendant, which suit was removed to the Supreme Court of the United States by virtue of a writ of error agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

"That the record as filed with the clerk of this Court is defective as not containing copy of two affidavits of Frederick C. Winkler, which were a part of the record in the lower court and were
92½ not included in the record sent to this Court by oversight of the clerk:"

You, therefore, are hereby commanded that, searching the record and proceedings in said cause, you certify what omissions, to the extent above enumerated, you shall find to the said Supreme Court of the United States, so that you have the same, together with this writ, before the said Supreme Court forthwith.

Witness the Honorable Mellville W. Fuller, Chief Justice of the Supreme Court of the United States, the 29th day of October, A. D. 1888.

JAMES H. McKENNEY,
*Clerk Supreme Court U. S.*

93 UNITED STATES OF AMERICA, }
*Western District of Wisconsin,* } *ss:*

I, F. M. Stewart, clerk of the circuit court of the United States of America for the western district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate with the originals now in my custody and they are true copies of their respective originals and are correct transcripts therefrom and of the whole thereof now on file and remaining of record in my office.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Madison, in the said western district of Wisconsin, this 21st day of February, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the said United States the one hundred and eleventh.

[Seal U. S. Circuit Court, Western Dist. of Wisconsin.]

F. M. STEWART, *Clerk.*

94 United States Circuit Court, Western District of Wisconsin.

JAMES GOODERHAM WORTS and Others, Executors of the Last Will and Testament of James Gooderham Worts, Deceased,

*against*

THE CITY OF WATERTOWN.

CITY AND COUNTY OF MILWAUKEE, } ss:
*In the Eastern District of Wisconsin,* }

Frederick C. Winkler, of said city, being duly sworn, says that he is one of the attorneys of the plaintiffs in the above-entitled action; that on the 14th day of January, 1884, he, in company with George P. Miller, Esq., attorney-at-law, of Milwaukee, attended at the city of Watertown for the purpose of examining the records of the city of Watertown in reference to matters of fact bearing on the motions to set aside the service of summons in the above-entitled and other actions pending in said court; met deponent and Mr. Miller; went to the office of the city clerk of the city of Watertown and there found Mr. Henry Bieber, the city clerk, and Mr. Daniel Hall, counsel for said city on said motion; that the city clerk then and there produced a book which contains the proceedings of the common council and of the board of street commissioners of said city
95 of Watertown for about five years last past; that said book contains the record of a meeting of the common council of said city held on the 11th day of April, 1882; that the record of said meeting closes on page 267 of said book; that the last entry in such record is that "the common council adjourned *sine die*," and that there is no further record of any meeting of the common council of said city thereafter until after the municipal election in April, 1883.

That immediately following said record commences the record of a meeting of the board of street commissioners of said city, of which the following is an accurate extract copy:

"Proceedings of a special meeting of the board of street commissioners held April 11th, 1882.

"Roll called.

"Present: The senior aldermen, Baxter, Hartwig, Koenig, Stacy, Voss, Zantner, Zoehert.

"On motion, Alderman Baxter was chosen chairman *pro tem.*

"The following resolution, introduced by Alderman Voss, was unanimously adopted:

"Resolved, That the senior aldermen present do now organize as a board of street commissioners; and further resolved that the rules of the common council be adopted as the rules of this body.

"On motion, the board adjourned until to-morrow at 8 o'clock p. m.

"HENRY BIEBER,
"*City Clerk.*"

96 That the following is an extract copy of the next following record in said book:

"Proceedings of an adjourned meeting of the board of street commissioners held April 12th, 1882.

"Roll called. All members present except Com. Baxter. Com. Stacy chosen chairman *pro tem.*

"On motion, the board adjourned.

"HENRY BIEBER,
"*City Clerk.*"

That the following is an extract copy of the next record in said book:

"Proceedings of a regular meeting of the board of street commissioners held April 24th, 1882.

"Roll called. All members present except Com. Zantner. Com. Baxter chosen chairman *pro tem.*

* * * * * * *

"The following resolution was introduced by Com. Voss:

"Resolved, That Mr. Daniel Hall be, and he is hereby, retained to assist the city attorney in the suits commenced by E. Mariner, of Milwaukee, and he is hereby directed to co-operate with the city attorney in defending the interests of the city in said suits; and be it further resolved that the judiciary committee is hereby directed to consult with said attorneys in the above suits, and to report to this board any progress made, with power to call special meetings of the board of street commissioners whenever necessary to take special action in the above-named matter.

"Unanimously adopted.

97 "On motion, the board adjourned.

"HENRY BIEBER,
"*City Clerk.*"

That said book also contained the record of a regular meeting of said board held May 8, 1882, with Com. Stacy chairman *pro tem.;* a like meeting held May 22, 1882, with Com. Baxter chairman *pro tem.;* a like meeting held June 5, 1882, with Com. Stacy chairman *pro tem.;* a like meeting held June 19, 1882, with Com. Voss chairman *pro tem.;* a like meeting held July, 3, 1882, with Com. Baxter chairman *pro tem.;* a special meeting held July 19, 1882, with Com. Baxter chairman *pro tem.;* a regular meeting held July 31, 1882, at which no quorum was present; a regular meeting held August 14, 1882, with Com. Voss chairman *pro tem.;* a regular meeting held Aug. 28, 1882, at which no quorum was present; a regular meeting held September 11, 1882, with Baxter chairman *pro tem.;* a regular meeting held Sept. 25, 1882, at which no quorum was present; a regular meeting held October 9, 1882, with Baxter chairman *pro tem.;* a regular meeting held October 23, 1882, with Baxter chairman *pro tem.;* a special meeting held November 11, 1882, with Voss chair-

man *pro tem.;* a meeting November 20, 1882, at which no quorum was present; a regular meeting held December 4, 1882, with Com. Baxter chairman *pro tem.*, and a special meeting held December 27, 1882, with Com. Baxter chairman *pro tem.*

Deponent further says that the record of the election of a
98 chairman at each of said meetings is invariably "Com. —— chosen chairman *pro tem.*," without any further words; nor is there anything anywhere in any of said proceedings limiting or attempting to limit or circumscribe the duties or powers of the chairman so elected; and that the record of the adjournment of said board at all said meetings is invariably in these words, "On motion, the board adjourned," and that at none of said meetings is there a record of an adjournment "*sine die;*" that the following is a correct extract copy of the record of the meeting of Dec. 4, 1882:

"Proceedings of a regular meeting of the board of street commissioners held December 4, 1882.

"Roll called and all members present except Com. Voss. Com. Baxter chosen chairman *pro tem.*

"On motion, the board adjourned.

"HENRY BIEBER,
"*City Clerk.*"

Deponent further says that at each of said meetings at which there was a quorum there were accounts audited and allowed by said board of street commissioners, partly against the general city fund and partly against the ward funds of the seven wards of the city of Watertown; that orders upon the treasurer of said city were issued for the accounts so allowed; that deponent examined a very large number of such orders issued during the year 1882 and the early
part of 1883 and the stub books on which said orders were
99 drawn, and from his examinations thereof and statements made to deponent at the time he made such examination by said Henry Bieber deponent states the fact to be that the common practice in said city has been to hold the meetings of said board evenings and to prepare said orders on a day subsequent to such meetings but bearing the date of the meeting at which the accounts for which they were issued were allowed, and that they were then signed by the city clerk and the chairman *pro tem.* chosen at such meeting, and that they were so signed after the adjournment of and on a day subsequent to such meeting.

Deponent further says that when such orders were first referred to, Mr. Hall stated to deponent that the chairman was authorized to sign such orders by an act of the Legislature of 1871, and stated his belief (but claimed to have no knowledge on the subject) that the practice had been to have orders for accounts allowed at one meeting signed by the chairman elected by the next meeting and at the time of the next meeting, and dependent at first understood said Bieber to say that such was the fact; that, to test this, deponent first investigated the proceedings of a regular meeting of said board

held February 12, 1883, at which a very large number of accounts were allowed; that W. D. Stacy was chosen chairman *pro tem.* of said meeting; that the meeting next thereafter was held February 26, 1883, at which Commissioner Voss was chosen chair-
100 man *pro tem.*, and deponent found that for all the accounts allowed at said meeting held February 12, 1883, city orders dated that day were issued—they were all signed by W. D. Stacey as chairman *pro tem.*, and more than half of them were paid before February 26, 1883; deponent, on further investigation, found that there were one hundred and ten orders on the city treasurer dated December 4, 1882; that each of them was for an account allowed at the meeting held December 4, 1882, and was signed by Thomas Baxter as chairman *pro tem.*, and fourteen of them were paid before the next meeting of said board, which was held December 27th, while most of them were not paid until the latter half of January and in February, which Mr. Bieber stated to be owing to the fact that orders issued in the latter part of the year were generally used for paying taxes. Deponent then turned to other meetings held in 1882, and found that orders for accounts allowed at any meeting were always signed by the commissioner chosen chairman at such meeting, although another commissioner might be chosen chairman *pro tem.* at the next meeting, and such orders were largely paid before another meeting was had next after the allowance of the accounts on which they were issued. For instance, there were 34 city orders issued dated July 19, 1882; they were all signed by Thomas Baxter, chairman *pro tem.*—all for accounts allowed
101 at the meeting held July 19th; 14 of the 34 were against the general city fund; 10 of the 14 were paid before the date of the next meeting. The time of payment of the orders on ward funds deponent did not examine. The first meeting after July 19th at which there was a quorum present was held August 14, 1882, and at that meeting Commissioner Voss was chosen chairman *pro tem.*

Deponent further says that said Henry Bieber very distinctly stated that he did not prepare the orders at the meeting at which the accounts were allowed; that the meetings were all held evenings; that he would prepare the orders on a subsequent day; that once in a while, only when some one was particularly anxious for his order and he knew that the account was one which would be allowed, he would prepare an order in advance of a meeting and then have it signed the same evening of its allowance; and he admitted, after the orders had been brought to his attention, that they were generally signed on a day subsequent to the meeting at which they were allowed by the chairman *pro tem.* chosen at said meeting, but stated that sometimes orders could be signed by the chairman chosen at the meeting next after the one at which the accounts were allowed; and deponent found an instance of that, viz: At a meeting held Feb'y 26, 1883, Com. Voss was chosen chairman *pro tem.;* there were seven accounts allowed, but only five orders signed by Com. Voss; orders for the other two were
102 signed by another com., who was chosen chairman at a meet-

ing held in March, 1883, but such two orders were not dated February 26, 1883, but bore the date of such March meeting.

All orders bearing date on the day on which they were allowed were, so far as deponent could ascertain, invariably signed by the chairman chosen at such meeting.

Deponent further says that said city clerk was unable to refer deponent to any record of the rules of the common council, but stated to deponent that as long as he had been in office, which is a series of years, every alternate Monday had always been the regular time for the meetings of the common council, if there was one, and of the board of street commissioners, if there was none. Deponent also says that in the proceedings of said board of street commissioners votes taken under suspension of the rules are of frequent occurrence.

Deponent further says that on the 18th of May, 1882, he caused to be mailed to the city attorney of Watertown a letter, of which the *amended* is a copy.

F. C. WINKLER.

Subscribed and sworn to before me this 16th of January, 1884.

CHAS. E. WILD,
*Notary Public, Wisconsin.*

103 Jas. G. Jenkins. F. C. Winkler. A. A. L. Smith.

Jenkins, Winkler & Smith, counselors-at-law.

MILWAUKEE, *May* 18, 1883.

H. Gartner, Esq., city attorney, Watertown, Wis.

DEAR SIR: On 23d Nov. last we commenced a suit in U. S. circuit c't, W. dist. of Wis., in favor of the executors of James Gooderham Worts, dec'd, ag'st The City of Watertown. On the 23d of December service was made, of which a return has been filed. We shall, on the 23d inst., apply to the court at Madison (judges Harlan & Bunn) to decide on the sufficiency of the service & for judgment. Supposing that you may desire to be heard in the application, we give you this notice, and remain,

Truly yours, JENKINS, WINKLER & SMITH.

[Endorsed:] U. S. circuit c't, W. dist. of Wis. James G. Worts *v.* City of Watertown. Affidavit. Filed Jan'y 16, 1884. F. M. Stewart, clerk.

104 CITY OF MADISON, } *ss:*
*In the Western District of Wisconsin,* }

United States Circuit Court for the Western District of Wisconsin.

JAMES G. WORTS & Others, Executors, &c.,
*ag'st*
THE CITY OF WATERTOWN.

Frederick C. Winkler, being duly sworn, says, upon information

and belief, that for some years prior to 1879, and since then, it has been the constant practice in the city of Watertown for the common council of the city to hold one meeting after the election of aldermen, in April in each year, and that thereupon all but the senior aldermen, constituting the board of street commissioners, would resign, and that the mayor of the city would also resign on the same day that he qualified, so that the city was substantially always without a mayor and president of the common council.

F. C. WINKLER.

Subscribed & sworn to before me this 16th of January, 1884.

GEO. W. BIRD,
*U. S. Court Commissioner, Western Dist. Wis.*

105 [Endorsed:] U. S. circuit court, western dist. of Wis. J. G. Worts *v.* The City of Watertown. Affidavit. Filed Jan'y 16, 1884. F. M. Stewart, clerk.

106 The answer and return of Romanzo Bunn, one of the judges of the circuit court of the United States for the western district of Wisconsin, to the writ of certiorari hereto annexed.

By virtue of and in obedience to the writ of certiorari, hereto annexed and to me directed, I do hereby certify and return to the Supreme Court of the United States that I have searched the record and proceedings in said cause mentioned in said writ of certiorari.

On the 16th & 17th of January, 1884, a motion similar to the motion in the cause mentioned in said writ of certiorari was argued and submitted in the case of James Gooderham Worts and others against The City of Watertown; the same counsel for the city of Watertown appeared in each of said cases, and, by agreement of counsel and with consent of the court, the said motion in the said Worts case & in the case mentioned in the writ of certiorari were heard together, and, by agreement of counsel made in open
107 court, it was agreed that two certain affidavits of Frederick C. Winkler, hereto attached and which were entitled in the Worts case, might also be used upon the hearing of the motion in the Amy case mentioned in the writ of certiorari, and were in fact used by counsel in the Amy case upon said motion, and used and considered by the court upon the determination of the said motion in the said Amy case.

That through inadvertence or because said two affidavits of said F. C. Winkler were entitled in the Worts case & not in the Amy case, said two affidavits of F. C. Winkler were not included in the record sent up to the Supreme Court of the United States, and I do therefore now return the same and annex hereto exemplified copies of the same.

All of which I do hereby certify and return as within I am commanded.

In witness whereof I have hereunto set my hand & seal
108 this — day of November, 1888, & caused the seal of said circuit court of the United States for the western district of Wisconsin to be hereto affixed.

Madison, Wis.

[Seal U. S. Circuit Court, Western Dist. of Wisconsin.]

ROMANZO BUNN, [SEAL.]
*Judge.*

109 [Endorsed:] Supreme Court U. S. 1888, October term. No. 196. Henry Amy *et al.*, pl'ffs in error, *vs.* The City of Watertown. Writ of certiorari and return.

[Stamped:] Office Supreme Court U. S. Filed Nov. 5, 1888. James H. McKenney, clerk.

Endorsed on cover: W. Wisconsin C. C. U. S. No. 196. Henry Amy and Gustavus L. Hoppenstedt, plaintiffs in error, *vs.* The City of Watertown. Filed November 9, 1885.

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

*No. 190.*

HENRY AMY and GUSTAVUS L. HOFFENSTEDT, Plaintiffs in Error,

*vs.*

THE CITY OF WATERTOWN, Defendant in Error.

## *ARGUMENT OF PLAINTIFFS IN ERROR.*


FINCHES, LYNDE & MILLER,

*Plaintiffs' Attorneys.*

GEORGE P. MILLER,

*Of Counsel.*



BRAMAN, ARMED & CRAMER, PRINTERS & PUBLISHERS, NEW YORK.

108 In witness whereof I have hereunto set my hand & seal this — day of November, 1888, & caused the seal of said circuit court of the United States for the western district of Wisconsin to be hereto affixed.

Madison, Wis.

[Seal U. S. Circuit Court, Western Dist. of Wisconsin.]

ROMANZO BUNN, [SEAL.]
*Judge.*

109 [Endorsed:] Supreme Court U. S. 1888, October term. No. 196. Henry Amy *et al.*, pl'ffs in error, *vs.* The City of Watertown. Writ of certiorari and return.

[Stamped:] Office Supreme Court U. S. Filed Nov. 5, 1888. James H. McKenney, clerk.

Endorsed on cover: W. Wisconsin C. C. U. S. No. 196. Henry Amy and Gustavus L. Hoppenstedt, plaintiffs in error, *vs.* The City of Watertown. Filed November 9, 1885.

Supreme Court, U. S.
FILED,
MAR 5 1889
JAMES H. McKENNEY,
CLERK.

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

*No. 196.*

**HENRY AMY and GUSTAVUS L. HOPPENSTEDT, Plaintiffs in Error,**

*vs.*

**THE CITY OF WATERTOWN, Defendant in Error.**

## *ARGUMENT OF PLAINTIFFS IN ERROR.*

FINCHES, LYNDE & MILLER,
*Plaintiffs' Attorneys.*

GEORGE P. MILLER,
*Of Counsel.*

CRAMER, AIKENS & CRAMER, ENGRAVERS & PRINTERS, MILWAUKEE.

IN THE

# Supreme Court of the United States.

| | |
|---|---|
| HENRY AMY AND GUSTAVUS L. HOPPENSTEDT, Plaintiffs in Error. *against* THE CITY OF WATERTOWN, Defendant in Error. | OCTOBER TERM, 1888. No. 196. |

## STATEMENT OF THE FACTS AND OF THE RECORD.

It appears from the record that a summons was issued in the cause (pages 4 and 5 of Record) on March 3d, 1873, and served on the defendant on March 6th, 1873. On March 24th, 1873 (Record, page 6), the defendant appeared specially and made a motion to set aside the service, and on the 8th day of April 1873 (Record, page 9), the Court set aside the service and directed the clerk to return the summons to the marshal for service. Thereafter, on December 23d, 1882, the marshal made a new return of service, which return is found on page 10, and is as follows:

SERVICE OF SUMMONS.

"Served on the within-named, The City of Watertown, "by delivering to Wm. H. Rohr, last mayor of said city;

"Henry Bieber, city clerk; Chas. H. Gardner, city attorney, "and Thomas Baxter, last presiding officer (or president or "chairman) of the Board of Street Commissioners of said "City of Watertown, each personally a copy of the within "summons, and by showing each of them this original sum- "mons this 23d day of December, 1882, the office of mayor "of said city being vacant and there being no president of "the Common Council nor presiding officer thereof in "office."

During the *June term* of the court, on June 19th, 1883, the plaintiffs filed their complaint (Record, p. 10 to 57) and an affidavit of no answer or appearance on the part of the defendant (page 57 of Record) and upon a report of the the clerk that there was due to the plaintiffs, as damages, the sum of $7,762.44, a judgment was entered on said 19th day of June, 1883, for said damages and costs. The judgment is found on page 58, of Record. The defendant thereafter appeared specially and upon affidavits moved to set aside the judgment. Thereafter in the December special term, 1883, of said court, on the 16th day of May, 1884, the Court made an order setting aside said judgment on the ground that the summons was not properly served upon the defendant (Record, page 67). The judgment was recovered during the *June term*, 1883, then followed the *September term*, and at the *December special term* the application came on to be heard on January 16th and 17th, 1884 (Record, page 75), and decided May 16th, 1884.

The writ of error in this case has been taken to reverse the order of the lower court, setting aside the judgment as aforesaid.

## ASSIGNMENT OF ERRORS.

1. The Court had no jurisdiction or power to vacate the judgment at a subsequent term.

2. The return of the Marshal showed a valid service which was not changed by the affidavits.

## ARGUMENT.

**I. The order of the lower Court, made May 16th, 1884, vacating the judgment recovered in favor of the plaintiffs in error on June 19th, 1883, must be reversed, because made at a subsequent term.**

The Circuit Court of the United States had no jurisdiction or power to vacate, on May 16th, 1884, the judgment of the Court which had been entered at a previous term, on June 19th, 1883. This is so well settled in this court that it requires no argument.

Phillips *vs.* Negley, 117 U. S., 665.
Bronson *vs.* Schulten, 104 U. S., 410.
Bank of the United States *vs.* Moss, 6 Howard, 31.
Ex parte Sibbald *vs.* U. S., 12 Peters, 492.

**II. Because on the merits the return of the marshal showed good service.**

The return of the marshal shows the following service (Record, p. 10):

"Served on the within-named, the City of Watertown, "by delivering to Wm. H. Rohr, last mayor of said city;

"Henry Bieber, city clerk; Chas. H. Gardner, city attorney, "and Thomas Baxter, last presiding officer (or president or "chairman) of the Board of Street Commissioners of said "City of Watertown, each personally a copy of the within "summons and by showing each of them this original sum- "mons this 23d day of December, 1882, the office of mayor "of said city being vacant and there being no president of "the Common Council nor presiding officer thereof in office."

**1. A summons can only be served upon the City of Watertown by a service upon its mayor.**

The consolidated charter of the City of Watertown (chapter 233 of the Laws of Wisconsin for 1865), provides:

*Chapter 9, Section 8:* "When any suit or action shall be "commenced against said city the service thereof may be "made by leaving a copy of the process *with the mayor.*"

**2. Plan of organization of the City of Watertown as shown by the laws.**

The City of Watertown was originally incorporated by chapter 45, of the private and local laws of Wisconsin, for 1853, but by an act of the Legislature of Wisconsin, approved March 28, 1865 (being chapter 233, of the Laws of Wisconsin, of 1865), the charter of the City of Watertown was consolidated so that its plan of organization can readily be understood by an examination of that law.

*Watertown under Consolidated Charter.*

Chapter 1, Section 3: "The said city shall be divided "into seven wards."

Section 4: "The corporate authority of said city shall "be vested in one principal officer, styled the mayor, in one "board of aldermen, consisting of two members from each "ward, who, with the mayor, shall be denominated the "common council * * * "

Section 5: "The annual election for ward and city

"officers shall be held on the first Tuesday of April of each "year * * * ."

Section 6: * * * "All elective officers, except "* * * aldermen, shall unless otherwise provided, "hold their respective offices for one year *and until their suc-"cessors are elected and qualified.*"

Section 7: "In the event of a vacancy in the office of "mayor, alderman * * * the Common Council "shall order a new election * * * ."

*Chapter 2, Section 2.* "The Mayor, when present, shall "preside over the meetings of the Common Council, and "shall take care that the laws of the State, and the ordi-"nances of the city, within the corporation, are duly en-"forced and observed, and that all officers of the city dis-"charge their respective duties. He shall appoint the police "force * * * He shall have a vote in case of a tie "only * * * ."

*Section 3.* "At the first meeting of the Common Council "in each year, or as soon thereafter as may be, they shall "proceed to elect by ballot, one of their number President; "and in the absence of the Mayor, the said President shall "preside over the meeting of the Common Council, and "during the absence of the Mayor from the city, or his in-"ability from any cause to discharge the duties of his office, "the President shall execute all the powers, and discharge all "the duties of Mayor. In case the Mayor and President "shall be absent from any meeting of the Common Council, "they shall proceed to elect a temporary presiding officer, "who, for the time being, shall discharge the duties of "Mayor. The President, or temporary presiding officer, "while presiding over the Council, or performing the duties "of Mayor, shall be styled 'Acting Mayor,' and acts per-"formed by them shall have the same force and validity as "if performed by the Mayor."

*Chapter 3, Section 3.* "The Common Council shall have "the management and control of the finances, and of all the "property of the city, and shall likewise, in addition to the "powers herein vested in them, have full power to make, "enact, ordain, establish, publish, enforce, altar, modify, "amend and repeal all such ordinances, rules and by-laws "for the government and good order of the city, for the sup-

"pression of vice and immorality, for the prevention of "crime and for the benefit of trade, commerce and health * " * * ."

The Common Council is then given, in twenty-six sections, the usual powers which are commonly vested in the Common Councils of cities.

*Chapter 5, Section 1.* "* * * All funds in the "treasury * * shall be under the control of the Com- "mon Council, and shall be drawn out upon the order of "mayor and clerk duly authorized by vote of the Common "Council * * *."

*Chapter 7, Section 2.* "The Common Council shall by "resolution levy such sum or sums of money as may be "sufficient for the several purposes for which taxes are here- "in authorized to be levied * * *."

Chapter 61 of the Private and Local Laws of Wisconsin for 1867 provides:

*Section 1.* "Section seven of the first chapter of said "act (an act to incorporate the City of Watertown and the "several acts amendatory thereof Chapter 233 of the "General Laws of 1865) is hereby amended so that it shall "read as follows:

"In the event of a vacancy in the office of Mayor * * "* by death, removal or other disability, the Common "Council shall order a new election * * *. In case of "a vacancy in the office of alderman the Mayor may order a "new election. * * *."

" * * * *Any city officer who shall resign his office shall "file with the city clerk his resignation in writing directed to the "Mayor and such resignation shall take effect from the time of "filing the same."*

*Watertown governed by "Board of Street Commissioners."*

Chapter 204 of the Private and Local Laws of Wisconsin for 1871 provides:

*Section 1.* "The senior alderman of each ward of the

"City of Watertown shall constitute a board of street com-
"missioners, who are hereby authorized, subject to the regu-
"lation and control of the Common Council, to audit and
"allow accounts against the city, * * * and when
"allowed, orders on the treasury shall issue therefor, and in
"case of vacancy in the office of Mayor, and there is no
"president of the Common Council to act, said orders may
"be signed by the chairman of said board and the City
"Clerk. The City Clerk shall be the clerk of said board,
"and shall keep record of its proceedings. The Mayor may
"preside at the meetings of said board, and they may elect
"a chairman who shall preside in his absence. * * *
"Said board shall have all the powers conferred upon the
"Common Council by the City Charter in relation to streets
"and bridges and sidewalks. * * * Said board are also
"authorized to canvass the returns of all votes polled at the
"election for city or ward officers, and determine and declare
"the result of such election."

*Section 2.* "In case of vacancy in the office of alderman
"in any of the wards, the aldermen remaining in office shall
"have and exercise all the powers of street commissioners of
"the ward. *The resignation of the Mayor shall be in writing di-*
"*rected to the Common Council or City Clerk, and filed with the*
"*City Clerk, and shall take effect at the time of filing the same.*"

Chapter 2, P. & L., 1872, amended said chapter as follows:

*Sec. 1.* "The Board of Street Commissioners of the City of
"Watertown shall have all the powers conferred by law upon
"the Common Council of said city, in relation to public
"schools, the police, fire department, nuisances, the regula-
"tion of slaughter houses, and the public health, subject to
"the regulation and control of said common council. Pro-
"vided that said Board of Street Commissioners shall have no
"power of levying taxes for any purpose whatever."

Chapter 46, of Laws of Wisconsin for 1879, provides:

*Section 2.* "The Board of Street Commissioners of said
"city, and the chairman of said board, shall have concur-
"rent power with the Mayor and Common Council of said city
"in the appointment of inspectors and clerks of election, and
"shall have all other powers conferred, by law, upon said

"Mayor and Common Council, subject to the control of said "Common Council, except the power of levying taxes, which "they shall not have in any case whatever."

*Section 3.* "The Common Council of said city may, in its "discretion, in any year, reduce the amount of city taxes "levied under section three, of chapter two hundred and four "of the private and local laws of 1871, and cause a less sum "than is levied under said section, to be placed in the tax "list for collection, for that year, for the several funds of the "city."

It will be seen that by the amendment of 1871, a new legislative body is created, called the Board of Street Commissioners, whose presiding officer is the mayor of the city, or in his absence *a chairman* to be elected by said board.

By the same act this board is authorized "to audit and allow accounts against the city and several wards, and when allowed, orders on the treasurer shall issue therefor, *and in case of a vacancy in the office of mayor, and there is no president of the Common Council to act, said orders may be signed by the chairman* of said board."

By Sec. 2, Chapter 46, Laws of 1879, the Board of Street Commissioners of said city, and the chairman of said board, shall have concurrent power with the mayor and Common Council of said city in the appointment of inspectors and clerks of election, *and shall have all other powers conferred by law upon said mayor and Common Council*, except the power of levying taxes.

The Board of Street Commissioners *takes the place* of the Common Council. It is contrary to all reason, as well as to the fact that there should be two contemporaneous legisla-

tive bodies in the city possessing precisely the same powers in all respects save one.

Besides that, it is, in the nature of things an impossibility. The Common Council consists of the mayor and fourteen aldermen. See section 4 and section 1 of subchapter 3, *supra*.

Mark the language: "The corporate authority of said city shall be vested in one principal officer, styled the mayor, and *one board* of aldermen."

Fourteen aldermen, *two from each ward*, together with the Mayor make the Common Council.

Seven of these aldermen, *one from each ward*, are designated as senior aldermen, and constitute the Board of Street Commissioners.

So long as the Common Council is in existence there is and can be no Board of Street Commissioners.

When the Common Council ceases to exist, then the Board of Street Commissioners comes into existence by force of Chapter 204, P. L. 1871, *supra*, clothed with all the powers of the Common Council, except the power of levying taxes.

If there is a Mayor, and he is present at a meeting of the Board of Street Commissioners, he presides; otherwise the Board of Street Commissioners elect "a chairman" who presides in the place of the Mayor, and, "*while presiding* over the Council (now transformed into a Board of Street Commissioners), or performing the duties of Mayor," is styled "acting Mayor," and acts performed by him have the same force and validity as if performed by the Mayor.

Sub-Chapter 2, Sec. 3, of Consolidated Charter, *supra*.

It follows then that under these circumstances the Board of Street Commissioners is the only governing body within the city limits and for the time being possesses all the corporate authority of the city, and is the corporate body. In other words, it is, with its chairman, *de facto*, the Mayor and Common Council of the city of Watertown.

The seven senior aldermen are necessarily a component part of the Common Council; without them a Common Council is impossible.

So that, whenever these seven senior aldermen organize themselves into the Board of Street Commissioners, this operates as a dissolution of the CommonCouncil.

In the absence of the Mayor (which, of course, means the filing of his resignation with the clerk), the board elects a chairman to preside in his place, and while so "*presiding*," he is styled "*acting mayor.*"

By chapter 46, Laws of 1879, it is declared in literal terms, that this chairman, and this Board of Street Commissioners, have *all the powers conferred by law upon the Mayor and Common Council*, except the power of levying taxes.

See provisions of charter and amendments quoted *supra*.

The plaintiffs in error contend, that the proposition that a municipal corporation can be created with all the functions and franchises known to the law, but without any responsibility for wrongs done by it, is repugnant to the fundamental principles of all honest government; and further, that it is not in the power of the Legislature, under the constitution, to create a municipal corporation with all the powers and franchises incident to such bodies, excepting the power of being sued, or being served with process.

Neither is it in the power of the Legislature, by any sort of legislation, to divest a municipal corporation already in existence, of the capacity or power of being sued, or of being served with process. The presumption of law is that the Legislature had no intention to do any such thing, and whatever the Legislature has done must be construed in favor of this presumption.

It follows, then, that that law allowing the resignation of the Mayor to take effect immediately without providing for a successor, thus creating a "vacancy" in the office of mayor, could not have intended that such a "vacancy" should prevent the city being sued, because it provided for a chairman or presiding officer of the "Board of Street Commissioners", and clothed him with all the powers of the Mayor, and made him in effect the "acting Mayor", so that process can be served upon him so as to bind the city. That this is the proper interpretation becomes still more apparent, when we consider that the laws which, in effect, abolished the office of mayor and the common council, provide for another chief executive officer and new common council under new names, but clothes the new bodies with all the powers of the old, except one.

Any other construction would necessarily raise the presumption that the Legislature intended, by means of these laws to wrong the creditors of the City of Watertown, by depriving them of the possibility of enforcing their claims by suit. Respectfully submitted,

FINCHES, LYNDE & MILLER,
*Attorneys for Plaintiffs in Error.*

GEO. P. MILLER,
*Of Counsel.*

February 26, 1889.

Office Supreme Court U. S.
FILED.
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JAMES. H. McKENNEY,
CLERK.

# Supreme Court of United States.

**OCTOBER TERM, 1888.**

No. 196.

HENRY AMY AND GUSTAVUS L. HOPPENSTEDT,
*Plaintiffs in Error.*

*vs.*

THE CITY OF WATERTOWN,
*Defendant in Error.*

## BRIEF OF DEFENDANT IN ERROR.

GEO. W. BIRD,
DANIEL HALL,
*Att's for Def't in Error.*

DEMOCRAT PRINTING COMPANY, PRINTERS, MADISON, WIS.

# Supreme Court of United States.

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*Plaintiffs in Error,*

*vs.*

THE CITY OF WATERTOWN,
*Defendant in Error.*

## BRIEF OF DEFENDANT IN ERROR.

### STATEMENT OF CASE.

On the 6th day of March, 1873, the summons issued in the action March 3d, 1873, was returned with the marshal's return thereon endorsed as follows, page 5:

"Served on the within The City of Watertown by delivering to August Tanck, city clerk, and Fred Meyer, city treasurer, of said city of Watertown, each personally a copy of the within summons this March 6th, 1873."

On March 25th, 1873, the defendant appeared specially "for the purpose of making a motion to set aside the service of the summons," and filed the affidavits of said Tanck and Meyer to the effect that they were not either of them, and never had been, the mayor or acting mayor of said city. The plaintiff filled the affidavit of the marshal to the

effect that at the time of service there was no mayor or acting mayor of the city, and, as he "has been informed and believes," there has been none since about February 14, 1873. Defendant also filed the affidavit of said Tanck, to the effect that he had examined the records of the city for the months of January, February, March and April, 1873, and from such record it appeared that F. Kusel, mayor of the city, resigned January 30, 1873, and that from that date to February 24, 1873, J. T. Moak was chairman of the board of street commissioners and acting mayor of the city, and from February 24 to March 17, 1873, Judson Prentice was temporary chairman of the board of street commissioners and acting mayor. See pages 6 to 9.

On the hearing of said motion, April 8, 1873, the court made the following order, page 9:

"This day came the defendant, by its attorney, Mr. Pease, and moved the court to set aside the service of the summons herein for want of proper service, and it appearing from the return of the marshal endorsed on the summons filed in this case that the summons has not been served upon the defendant in the manner prescribed by law, so as to give the court jurisdiction of the defendant or so as to entertain any motion or proceedings in this case as against said defendant or on its behalf unless it appears, it is ordered by the court that the motion be, and hereby is, denied, and the clerk is hereby authorized to return said summons to the marshal, to be served on the defendant according to law or for such further action as the defendant may direct conformably to law."

Nothing further was done in the cause until December 23, 1882, when the marshal made the following return on the summons, page 10:

"Served on the within-named the City of Watertown by delivering to Wm. H. Rohr, last mayor of said city; Henry Bieber, City Clerk; Chas. H. Gardner city attorney, and Thomas Baxter, last presiding office. (or president or ch'm'n),

of the board of street commissioners of said city of Watertown, each personally a copy of the within summons and by showing each of them this original summons this 23d day of December, 1882, the office of mayor of said city being vacant and there being no president of the common council nor presiding officer thereof in office."

On June 19, 1883, plaintiffs filed their complaint setting out four bonds of $1,000 each, dated June 1, 1856, issued by the defendant to aid in the construction of the Watertown and Madison Railroad, and payable January 1, 1877, with eight per cent. interest payable semi-annually, upon presentation and surrender of the interest warrants or coupons attached to the bond; and setting forth, also, 84 of such coupons of $40 each, and demanding judgment for the amount of said coupons, $3,360, together with interest at seven per cent. on the amount of each coupon from the time it became due. Pages 10 to 57.

On the same day, June 19, 1883, plaintiffs filed an affidavit of no answer or appearance, caused the amount due on the '84 coupons to be computed by the clerk, and thereupon the court rendered judgment against the defendant by default for the amount so found due, to-wit., $7,762.44 damages and $49.70 costs, page 58.

On the 27th day of July, 1883, the defendant appeared specially for the purpose, and served notice of motion to set aside the judgment and service on the ground that there had been no service of summons and the court had no jurisdiction of defendant, page 59. The motion was based upon the judgment, the foregoing returns of the marshal and the affidavits of Henry Bieber, Thomas Baxter and William H. Rohr, page 59. These affidavits show the following facts:

1. That William H. Rohr, designated in the marshal's return as the "last mayor of said city," was elected mayor at the annual municipal election, April 4, 1882, duly qualified and entered upon the duties of the office, and there-

after, on April 10, 1882, duly resigned the office, and had not since been mayor or acting mayor or president of the common council. (Rohr's affidavit, page 66, and latter part of Bieber's, page 63).

2. That Charles H. Gardner, named in the return, was never attorney for defendant in this action, or authorized to appear or to accept, admit or receive service for it herein, Bieber's affidavit, page 62.

3. That Thomas Baxter designated in the return as "last presiding officer (or president or ch'm'n) of the board of street commissioners of said city," was the senior alderman of the 3d ward, and as such a member of the board of street commissioners of the city, from April 10, 1882, to April 7, 1883.

That but one meeting of said board was held in November, 1882, and that was on November 11, 1882, that no mayor and no chairman elected by the board to preside at its meetings in the mayor's absence, being present, William F. Voss, senior alderman of the 6th ward, and a member of the board, was chosen by a *viva voce* vote of the members present chairman *pro tem.*, to preside at that particular meeting, which, after the transaction of its business, adjourned on said 11th day of November, 1882.

That there were only three meetings of said board in December, 1882, to wit, regular meetings December 4th and 18th, and a special meeting December 27th; that there being no mayor nor chairman elected by the board to preside at its meetings in the mayor's absence, present at either of said meetings of December 4th or 27th, said Baxter was chosen at each said meeting by a *viva voce* vote of the members present, chairman *pro tem.* to preside at that particular meeting, and that said meetings adjourned *sine die* respectively on December 4th and 27th, after the transaction of their business, and that said Baxter ceased to be such temporary chairman after the adjournment of said meetings. That the meeting of December 18th, being with-

out a quorum adjourned without the transaction of any business. And that no meeting of said board was held after December 27th until January 15, 1883.

That besides said two meetings in December, said Baxter has alternated with other members of said board in being chosen in like manner and under like circumstances temporary chairman to preside at particular meetings of said board, but not at said meeting of December 18th, and that said board never elected, chose or appointed him chairman thereof, or chairman to preside at its meetings in the mayor's absence, and that he never was such chairman or presiding officer, or anything more than merely chairman *pro tempore* of particular meetings as above.

4. That no copy of the summons had ever been delivered to the mayor of the city, and no summons in the action served on the city or mayor, or anything done toward service, except the delivery, December 23, 1882, of four copies one each to the clerk, said Baxter, Gardner and Rohr, and delivery March 6, 1873, of a copy to said Tanck and Meyer, neither of whom was mayor, acting mayor, or president of the common council.

See affidavits of Henry Bieber and Thomas Baxter, pages 60 to 65 of the record.

The plaintiff submitted the two affidavits of Mr. Winkler, pages 70 and 74, by which it appears:

1. That the book in the city clerk's office containing the record of the proceedings of the common council and of the board of street commissioners for about five years before January, 1884, contains a record of a meeting of the common council, April 11, 1882, the last entry of which is, "the common council adjourned *sine die*," and that there is no further record of a common council meeting thereafter until after the municipal election in April, 1883, and that immediately following said record commences the record of a meeting of the board of street commissioners, April 11, 1882, which is followed by the record of other meetings of the board up to

December 27, 1882, at each of which meetings some member of the board, either Com. Stacey, Com. Baxter or Com. Voss was chosen chairman *pro tem.* and the record of the adjournment of each meeting is, "On motion the board adjourned," and at one of such meetings a resolution was passed retaining Mr. Daniel Hall "to assist the city attorney in the suits commenced by E. Mariner."

2. That accounts were audited at said meetings and orders upon the city treasurer drawn therefor on a subsequent day and signed by the commissioner who had been chosen chairman *pro tem.* at the meeting auditing the accounts, and that the common practice had been to hold meetings of the board evenings, prepare the orders on a subsequent day, but bearing the date of the meeting, and were then signed by the city clerk and chairman *pro tem.* chosen as such meeting.

3. That the city clerk said every alternate Monday had always, for a series of years, been the regular time for meettings of the common council, if there was one, and of the board of street commissioners if there was none.

4. The affiant states further, upon information and belief, that for some years prior to 1879 and since, it has been the constant practice for the common council to hold one meeting after the election of aldermen, in April each year, and then all but the senier aldermen constituting the board of street commissioners, would resign, and the mayor would also resign at the same time.

On the hearing of the motion, May 16, 1884, the court made an order setting aside the judgment "on the ground that the summons herein was not properly served on said defendant, and the court had no jurisdiction thereof," page 67. To review the decision of the court in making that order the plaintiff in error has sued out the writ of error herein.

# ARGUMENT.

## I.

The marshal's return fails to show service of summons upon defendant in the manner prescribed by law.

1. The manner prescribed by law for service of process upon the city of Watertown, as declared in its charter, is "by leaving a copy of the process with the mayor."

Sec. 8, sub-ch. 9 of ch. 337, P. and L. Laws of 1856, and,

Chap. 233, G. L. 1865, of Wisconsin.

While that prescribed by the Revised Statutes for cities generally is "by delivering a copy thereof to the mayor and city clerk."

Sec. 2637, Revised Statutes of 1878, of Wisconsin.

Whichever provision controls, to constitute service of process upon the city of Watertown, a copy thereof must be delivered to the mayor.

The manner of service prescribed by law for this case, then, is "by leaving a copy of the process with the mayor." The service made, as appears by the marshal's return, was by delivering a copy to the *last* mayor, city clerk, city attorney, and the *last* presiding officer, or president or chairman of the board of street commissioners, the office of mayor being vacant and there being no president of the common council nor presiding officer thereof in office. This, we submit, is not the manner of service prescribed by law, and the mere statement of the statutory provisions and the service in fact made, would seem to be sufficient to settle that proposition. But the earnestness of suitors in urging a different view justifies further discussion.

2. The uniform course of decision for years in the state of Wisconsin has been, both in the state and Federal courts, when argument has been had, that service of process upon a city could be made only by delivery of a copy of the process to the mayor—that delivery to any other officer or party, without delivery to the mayor, would not constitute service so as to give the court jurisdiction.

The cases in the circuit court of the United States for the western district of Wisconsin, are as follows:

*Perkins v. The City of Watertown*, 5 Bissel, 320, decided in 1873, where copies of the process had been delivered to the mayor elect before he had qualified, and to the city clerk and city treasurer. It was shown also that there was no mayor or acting mayor upon whom service could be made. The court, after full argument, held there was no service upon the city, and said:

"The charter of the city authorizes suits to be commenced against it by the service of process upon the mayor, and the question now presented is, *whether it can be served upon any other officer or party so as to give this court jurisdiction.* * * * The corporation is created by the state legislature, its powers and rights emanated from that source, and if there are defects in the organic law, it is for the legislature, and not the courts, to correct them. * * * It is stated and shown by the papers that there was no mayor or acting mayor upon whom service could be made under the statute; *but that does not augment the power of this court, or confer upon it legislative authority.* Courts must administer the law as they find it, not supply defects in legislation when a difficult or hard case presents itself. Such considerations are to be addressed to the law-making power, not to the courts."

*Worts et al. v. The City of Watertown*, where the return was as follows:

"Served the annexed summons on the city of Watertown, by delivering a copy thereof to Henry Bieber, city clerk,

and also a copy thereof to Charles H. Gardner, city attorney, and also a copy thereof to Thomas Baxter, the last elected chairman of the board of street commissioners of said city, this 23d day of December, 1882, the office of mayor of said city being vacant and there being no president of the common council, nor presiding officer of the common council in office."

The court (Mr. Justice HARLAN and District Judge BUNN) upon the *ex parte* argument of plaintiff's counsel, and without hearing defendant, first held that service good. But afterwards the city moved to set aside the service and the judgment against it entered thereon by default. The motion was argued by counsel for both parties at length, and printed briefs submitted; and that court after a thorough consideration, reviewd and overruled its former decision and held the service insufficient and set aside the judgment and service on the 26th day of May, 1884. (See record of that case now in this court.)

*Knowlton et al. v The City of Watertown, Spaulding et al. v. The City of Watertown, and Amy. et al. v. The City of Watertown*, decided in 1873, in the first of which copies of the process had been delivered to the city clerk, the city treasurer, and "to Christ Mayer, an aldermen from the first ward of said city, and an acting member of the board of aldermen of said city and mayor elect of said city * * there being no other person acting as mayor of said city"; in the other two, to the city clerk and city treasurer, it appearing also that there was no mayor or acting mayor. It was held no service. The records of those cases are now in this court, but not on the question of service then decided.

There are three cases in the Supreme Court of Wisconsin wherein the question of service on this particular defendant was raised. The first is,

*Heyman v. Cunningham*, 51 Wis., 506, decided in 1881. There copies of the summons and complaint were delivered to, and left with, the chairman of the board of street com-

missioners and the city clerk, "there being no mayor of said defendant." The sufficiency of this service was not passed upon, as the case was disposed of on other grounds, but, of it, the court said, on page 518:

"Although we have great doubts upon the sufficiency of the service * * * to give the court jurisdiction of the defendant, city, we do not deem the decision of that question necessary to the determination of the rights of the appellant in this proceeding, and, therefore, do not pass upon it."

The next case was *The City of Watertown v. Robinson et al.*, 59 Wis., 513, decided in 1884. There copies of the summons and complaint had been delivered to the city clerk, and delivered to and left "with W. D. Stacy, Chairman of the Board of Street Commissioners of said defendant, while said board of street commissioners was in session, and while said W. D. Stacy was presiding as chairman at a regular meeting of said board, in the absence of the mayor of said defendant," the officer also certifying that, after diligent search, he could not find the mayor. It was held that did not show service on the city, and the court after referring to the provisions as to service contained in the charter and Revised Statutes, heretofore quoted, said:

The question whether the Revised Statutes control as to the manner of service is not a material inquiry here, because both the charter and general provision require the service to be made upon the mayor, but no service was made upon that officer as appears by the return of the sheriff. The principal is too elementary to need discussion, that a court, can only acquire jurisdiction of a party — where there is no appearance — by the service of process in the manner prescribed by law."

A motion for a rehearing was made and denied in that case.

The next case was,

*The City of Watertown, imp. etc., v. Robinson*, 69 Wis.,

230, decided in 1887. There copies of the summons and complaint had been delivered to and left with Ulrich Habhegger chairman of the board of street commissioners, while said board was in session and said Habhegger presiding as chairman thereof, at a regular meeting of said board, and to the city clerk. At the time there was no mayor, that office being vacant, and there was no president or presiding officer of the common council. It was held that this did not constitute service upon the city, and the court say:

"When the statute prescribes a particular mode of service, that mode must be followed. *Ita lex scripta est*. There is no chance to speculate whether some other mode will not answer as well. This has been too often held by this court to require further citations, but the strong language of Chief Justice RYAN in *Foster vs. Hammond*, 37 Wis., 187, is worthy of special reference"; and, again,

"When the statute designates a particular officer to whom the process may be delivered, and with whom it may be left, as service upon the corporation, no other officer or person can be substituted in his place. The designation of one particular officer upon whom service may be made excludes all others. The temporary inconvenience arising from a vacancy in the office of mayor affords no good reason for a substitution of some other officer in his place, upon whom service could be made, by unwarrantable construction not contemplated by the statute."

As early as 1862, the supreme court of Wisconsin had decided, that where the statutes of that state provided that service of process upon a corporation should be made by delivering a copy to a particular officer named, the delivery must be to that officer, and a delivery to any other officer would not constitute service.

*Upper Miss. Trans. Co. v. Whittaker*, 16 Wis., 220.
*Farmers' Loan & Trust Co. v. Warren*, 20 Wis., 290.

The law, then, on this subject, as thus determined by the Supreme Court of Wisconsin, and by the United States cir-

cuit court for the western district of Wisconsin, is that leaving a copy of process with the chairman of the board of street commissioners is not service upon the city of Watertown, in the manner prescribed by law, even though the office of mayor be vacant, and for the palpably plain and all-sufficient reason that leaving the copy with the chairman of the board of street commissioners is not leaving it with the mayor.

Under the well settled rule of this court, the construction put upon these statutes by the Supreme Court of Wisconsin, will be adopted and followed by the United States Courts.

*Leffingwell v. Warren*, 2 Black, 599.
*Luther v. Borden*, 7 How., 40.
*Burgess v. Seligman*, 17 Otto, 20.
*Bucher v. Cheshire R. R. Co.*, 125 U. S., 555.

## II.

If the decisions of the Supreme Court of Wisconsin above cited are not to be regarded as rules of decision so as to preclude further examination here, still the doctrine announced in them and applied by the circuit court in this case, is abundantly sustained by reason and authority.

1. Where there is no appearance, jurisdiction can be acquired only by service of process in the manner prescribed by law, and if the statute prescribes a particular manner of service, that particular statutory method must be pursued.

*Hollingworth v. Barbour*, 4 Pet., 466.
*Pennoyer v. Neff*, 95 U. S., 714.
*Harkness v. Hyde*, 98 U. S., 476.
*St. Clair v. Cox*, 106 U. S., 350.

The Supreme Court of Wisconsin has frequently asserted and applied this doctrine, saying, in *Fink et al. v. Sly*, 4 Wis., 310, at page 311: "It is obvious that jurisdiction must be derived from the process of the court and service thereof, in the manner prescribed by law, for there was no appearance to aid a defective process or irregular service;" in *Conger v. Railroad Company*, 17 Wis., 478, at page 485: "Of course if there had been no voluntary or general appearance then the court could have acquired jurisdiction of the corporation only in the manner pointed out in the statute;" in the *City of Watertown v. Robinson et al.*, 59 Wis., 513, at page 516: "The principle is too elementary to need discussion, that a court can only acquire jurisdiction of a party, where there is no appearance, by the service of process in the manner prescribed by law."

This is familiar law and needs no citations to support it. But to illustrate the uniform strictness with which it has been applied and enforced, under statutory provisions and attempts at service in principle like those here under inquiry, rather than to support the doctrine itself, we append the following brief mention of cases:

In *Alexandria v. Fairfax*, 5 Otto, 774, service on a corporation was required to be made on "its mayor, rector, president, or other chief officer," or in their absence, "on the president of the council or board of trustees, or in his absence, on the recorder or any alderman or trustee," if a city or town. Held service on the auditor not good. The court say: "But an incorporated city is not an individual, and service of notice or process on one of its citizens is not service on it. It has its officers who speak and act for it by authority of law; and some one of these officers, *either by an express statutory provision*, or by the nature of their functions, is the proper person on whom all notices and processes necessary to bind it by judicial proceedings must be served."

After discussing whether the nature of the auditor's func-

tions were such as to make service on him, service on the city in the absence of a statute prescribing the manner of service on the city, the court say:

"But we are relieved from any difficulty on this subject by the statute of Virginia, which prescribes as every law should do under which corporations are organized, the mode of serving process or notice on them. It points out the officers of the corporation on whom such process or notice may be served, and is so liberal in providing for service as to leave no excuse for departing from it by a service on anyone else."

In *Kibbe v. Benson*, 17 *Wall*, 624, the statute required a delivery to the defendant personally, or, if absent, a leaving with a member of his family *at his residence.* The return showed leaving with defendant's father, a member of his family, *at the dwelling house of the said defendant.* The proof, on contest, showed the delivery to the father to have been at the corner of the yard adjoining the dwelling, inside the yard and not over 125 feet from the dwelling. Held not good service, because not strictly and literally at his residence as prescribed by law.

In *Sacramento v. Fowle*, 21 *Wall*, 119, service was required to be made by delivery "to the president *or other head* of *the* corporation." The return showed delivery to defendant's president of the board of trustees declared by charter to be "general executive officer of the city government," and, "the head of police and general executive head of the city." Held good service, and the court, after stating that the president of the board of trustees, was clearly "the head of the corporation" and that service on him was good, say: "Indeed, it would seem that *service upon any officer of less grade would not be a compliance with the statute.* The legislature doubtless intended, in pursuance of a wise public policy to guard the city from the consequences which have sometimes followed legislation permitting suits to be prosecuted against municipal corporations *where process was*

*served upon any officer of the city government.* It is easy to see that in such a case the public interests might suffer, but no reasonable apprehension could be indulged in this regard if the chief officer intrusted by the people with the management of their affairs was notified of the pendency of judicial proceedings."

In *Settlemier v. Sullivan*, 97 U. S., 444, the statute required service of process to be made by personal delivery of a copy to the party, or, if he could not be found, to some white person of his family at his dwelling house. The return of service showed delivery of a copy to the wife of the party at his dwelling house, but did not show the inability of the officer to find the defendant. It was held that it did not show service, the court saying:

"Personal citation to the defendant or his voluntary appearance is the essential preliminary to a purely personal judgment."

In *Evans v. The Dublin & Drogheda Railway Co.*, 14 M. & W., 142, the statute required service to be made "upon a secretary or clerk of the said company, or leaving the same at the office of the said company, or of a secretary or clerk, or delivering the same to some inmate at such office of the company, or at the last or usual place of abode of such secretary or clerk, or, in case the same respectively shall not be found or known, then personal service thereof upon any other agent or officer employed by the said company, or any one director of the said company, or delivering the same to some inmate of the last or usual place of abode of such agent, or officer, or director." The defendant had no office, secretary or clerk in England, but had a director in the city of London. Held, that service on such director in London was not good service on the company.

In *Walton v. The Universal Salvage Co.*, 16 M. & W., 438, the statute required summons against a corporation to "be served upon the mayor, or other head officer, or on the town clerk, clerk, treasurer or secretary of such corpora-

tion" The summons was served on a clerk in the office of the defendant's secretary, and the secretary acknowledged the fact of service. Held, not good service, the court saying, PARKE, B.: "The act, in directing service of process to be made on a 'clerk' to the corporation sued, means some principal officer, not a clerk in its secretary's office."

ALDERSON, B.— "If an act directs personal service on a particular person, *we should do wrong to admit equivalents in lieu of that service.*"

In *Towne v. London & Limerick Steamship Co.*, 5 C. B. N. S., 730, the statute required the service to "be made on the mayor, or other head officer, or on the town clerk, clerk, treasurer or secretary of such corporation" Held service on one of the directors of the company not good service.

In *Mackrieth v. The Glasgow & S. W. Railway Co.*, 42 L. J. Exch., 82, service was required to be made as in preceding case. Held, that service on the defendant's clerk at its only Station in England having only authority to issue tickets to passengers, not good service.

In *Garton v. The Great Western Railway Co.*, 27 L. J. Q. B., 375, process was required to be served by the same being left at, or transmitted through the post, directed to the principal office of the company, or one of their principal offices, where there shall be more than one, or being given personally to the secretary, or in case there be no secretary, by being given to any one director. Service on the superintendent of defendant's office at Bristol, held not good service, defendant's only principal office being in London.

In *Brydolf v. Wolf, Carpenter & Co.*, 32 Iowa, 509, the statute provided that in actions against a partnership, "service may be made upon any member of the firm, or upon any agent employed in the general management of the business of the partnership." The statute also provided that service on an individual might be made, in case he could not be found, by leaving a copy at his usual place of residence, with some member of his family over fourteen years of age.

A copy was left with the wife of one member of the firm, at his residence. *Held*, not good service on the firm. The court, after stating that if such service were held good, then service on the wife of the officer of a corporation upon whom service is required to be made, would be service on the corporation say: "We would not be justified in extending the plain language of the statute by a construction leading to such results, and we therefore hold that the statute, in providing that 'when action is against a partnership, service may be made upon any member thereof, or upon any agent employed in the general management of their business,' contemplated a personal service upon the persons named, *no other persons or mode being mentioned*, and that the service of the original notice in this case upon the wife of one of th partners was insufficient."

In *Lambert v. Sample*, 25 Ohio St., 346, statute provided "the service shall be by delivering a copy of the summons to the defendant personally, or by leaving one *at his usual place of residence*." Service on defendant "by leaving a true copy *at his place of business*," held, not good.

In *Hall v. The Atlantic & Pacific R. R. Co.*, 64 Mo., 561, the statute required the summons to be served "on the president or other chief officer of such company, or in his absence by leaving a copy thereof at any business office of said company with the person having charge thereof." The return showed service by leaving a copy "at a business office of the within named defendant, with A. W. Dickinson, the person having charge thereof, in the absence of the president or chief officer of the defendant."

Held, not good service. The court say: "If the service be not on the chief officer, the officer in his return must state his absence or that he can not be found. That he cannot be found, where? The county is the sheriff's bailiwick, and when a summons is delivered to him to be served, it is his duty to seek the party through his county, and then if

he fail to find him, his return is that *he could not find him in the county.*

* * * * In *Dixon v. Han. & St. J. R. R. Co.*, 31 Mo., 407, Judge EWING in delivering the opinion of the court, speaking of and construing the 26th section, said: 'The absence of the chief officer spoken of is not a temporary absence from the office usually occupied by him, but an absence from the county.'"

In *First National Bank v. J. R. Wilson et al.*, 80 N. C., 200, service was required to be made by delivery to the defendant personally. The summons was delivered to Wilson's wife, then by her to him, and he verbally recognized and assented to the service. Held, not good service, and the court say:

"Can proof of the delivery of the copy by the wife to J. R. Wilson, and of his recognition and verbal assent, make the service sufficient? It certainly is not within the words of the statute requiring a personal service by the sheriff, and from the express enactment that voluntary appearance of the party should be equivalent to personal service, it manifestly excludes the delivery of the copy by the wife as sufficient, even if proved to have been delivered: and it is equally manifest that no verbal admission of service or assent to the service as made, will be a service within the provision which excludes any admission of service except it be in writing"

In *Cheny v. North & South R. R. Co.*, 59 Ga., 446, the Governor had seized and placed defendant in the hands of a receiver who was operating the road, and in so doing continued the agents at the different stations in their usual employment. The statute provided that service on a corporation might be made upon its officer or agent, or by leaving a copy at its place of business. While the receiver was in possession, service was made upon one of the agents so continued by him at his usual employment. *Held*, not good service on defendant.

In *Michigan State Ins. Co. v. Abens*, 3 Ill. App., 438, the

statute required service on a corporation to be made "by leaving a copy thereof with its president, if he can be found in the county in which the suit is brought; if he shall not be found in the county, then by leaving a copy with," among others, "any agent of said company found in the county." The statute also provided that in case any foreign insurance company should cease to do business in the state, "the agents last designated, or acting as such for such corporation, shall be deemed to continue agents for such corporation for the purpose of serving process." The action was in the city court of Aurora. The sheriff's returns showed service upon defendant, "by reading and by delivering a copy to C. H. White and David Iliff, as agents for said company, the president of said company not found in the city of Aurora, Kane county, Ills., this 10th day of May, 1876." The proof showed that White and Iliff had ceased to be agents for defendant for a considerable period previous to the service on them, and that R. S. Cutchell had been continned as agent in Chicago after they had been discharged.

Held, not good service. The court say: "A service very similar was held in *Ill. & Miss. Tel. Co. v. Kennedy*, 24 Ill., 319, to be insufficient. It was there said that the return must be positive, and the sheriff takes upon himself the responsibility of determining the fact whether the service was actually made upon an officer of the corporation. The service here is defective, not only in this respect, but it is also open to another objection. It states that the president of the company was not found in the city of Aurora. What is the inference to be drawn from that statement? Simply that he might have been found outside of the city, in the County of Kane, if search had been made. This is not a compliance with the statute, which authorizes a service upon an agent only in case the president cannot be found in the county where the suit is brought. * * The statute (providing for service on agent last designated, etc.)

"evidently refers to the agent last acting in the entire state, and not such as may have been dispensed with in any particular county where the plaintiff happens to reside, provided others remain in the jurisdiction upon which service can be made."

To the same effect is *St. Louis V. & S. H. R. R. Co. v. Dawson et al*, 3 Ill. App., 118.

In *Reynolds v Orvis*, 7 Cow., 259, the statute required service of warrant for examination of a pauper to be made by the constable of the town liable to become chargeable. It was, in fact, served by a justice of another town, but in the same county. Held, not good service; and the court say:

"The right to bring a person for examination is given, *the manner that right is to be exercised is prescribed*. When a rule is laid down for the government of inferior jurisdictions, we are not at liberty to inquire whether it can be safely departed from: whether the mode pursued is equally beneficial to the party, as that pointed out by the statute. The answer to arguments of this kind, is, *that the law has prescribed the manner in which the person of the pauper may be apprehended*. If the appearance of the pauper is not voluntary, jurisdiction of his person cannot be acquired, *unless the course prescribed is pursued.*"

In *Nelson v. Woodward*, 4 N. W. Rep., 237, Neb., the statute required service to be made "by delivering a copy of the summons, with the endorsements, thereon, to the defendant, or leaving the same at his usual place of abode. In the return the officer certified: "I served the within writ of summons on the within named Matthew Newlove, by reading to him a true and certified copy of the same, with all the endorsements thereon."

Held, not good service, and the court say: "*A summons must be served upon a defendant in the mode provided by the statute*, in order to give the court jurisdiction, unless the defendant by an appearance remove the defect."

In *Scorpion Silver Mining Co. v. Marsons*, 10 *Nev.*, 370, the statute made a delivery to the "managing agent" good service. The return showed a delivery to the "business manager." Held not good service. The court say:

"The statute makes the delivery of a copy of the summons to the '*managing agent*' of a foreign corporation, service upon the corporation, but it does not mention '*business manager*' of a corporation in that connection. It is contended, however, that 'business manager' and 'managing agent' mean the same thing, and to name the one is to name the other, and consequently that the return of the officer by itself shows a service by delivery of a copy of summons to the 'managing agent' of the defendant. But we cannot assent to either of these propositions."

In *Chambers v. Bridge M'f'g Co*, 16 *Kan.*, 270, the statute provided that in the absence of its chief officer, a summons against a corporation might be served upon, among other officers, *its clerk* Held service on one keeping the books of the company, was not good service. The court say:

"It is true, a book keeper is in one sense a clerk. Any person who performs clerical duties is, in one sense a clerk. But the service of a summons upon a corporation cannot be made upon every person who may in some remote sense be styled a clerk of the corporation. *It could not be made on a deputy or under clerk.* It must be made on *the clerk*, the principal clerk of the corporation, if made on a clerk at all. It must be made upon the person *who holds the office* of clerk or secretary, as the case may be. In proper cases a service on the person *who holds the office* of clerk or secretary, of the corporation would be a good service, although such person might not in fact perform any of the clerical duties of the corporation. For instance, if the service had been made on Haywood, *the secretary* of the corporation in this case, instead of on Johnson, *the bookkeeper*, the service would have been a valid service, whether Haywood performed any of the clerical duties or not." So in the case at

bar, the service must be upon *the person who holds the office* of mayor, as distinguished from any and all persons who may, under certain circumstances, discharge some of the duties of mayor.

In *Lake Shore & Mich. S. R. Co. v. Hunt*, 39 Mich., 469, the statute permitted service on a corporation garnishee to be made on "the president, cashier, secretary, treasurer, *general or special agent*, superintendent or other principal officer." Return showed service on "John W. Drew, agent of the within named defendant," but did not disclose the character of Drew's agency. Held not good service. The Court say: "The terms 'general or special agent,' are very indefinite, but employed as they are here in association with terms designating the principal officers of the corporation, they evidently intend agents who either generally or in respect to some particular department of the corporate business have a controlling authority, either general or special. They do not mean every man who is entrusted with a commission or employment."

In *American Express Co. v. Conant*, 45 Mich., 642, statute required service to be made on the person appointed by power of attorney executed by the company and filed with state treasurer. Return showed summons served "by reading the same to the defendant and delivering to R. G. Cooper, agent of the American Express Company, at Lakeview, a copy thereof."

Held not good service, the court saying: "The statute * * prescribes the mode of service in such cases As there was no attempt to comply with such provisions the court acquired no jurisdiction.

In *Union Pacific R. Co. v. Miller et al*, 87 Ill., 45, held service on a land agent appointed by the land commissioner of the company, a foreign corporation, was not good service on the corporation, under a law requiring the service to be made upon an agent of the corporation.

In *Helms et al v. Chadbourne et al., Ex's.*, 45 Wis., 60, a

judgment against a widowed mother and her two minor children under fourteen years of age living with her, was attacked. Service was made by delivering a copy of the summons personally to the mother and to each of the children. The statute required service on such minors to be made by delivery of a copy of the summons "to such minor personally, and also to his father, mother or guardian." Held not good service. The delivery of a copy of the summons to the mother as a defendant in the case, did not satisfy the statute. But it must be delivered to her in her character of mother of the infant. The court say: "It is said it would have subserved no good purpose to have left copies of the summons with the mother for the infants, because she had already been individually served. But the conclusive answer to this argument is, that the statute clearly requires such a mode of service; *ita lex scripta est.*" The statute "expressly declares that the service must be made by delivering a copy to the minor personally, and also to the father, etc., for the infant. In no other way can jurisdiction over the minor be obtained. And it therefore is no answer to say that it was useless to serve two copies of the summons on the mother for the infants in this case because she had herself been served as defendant in the action."

The manner of service prescribed by statute must be strictly followed. That some other mode of service satisfies the object contemplated by the statute, makes no difference. *Ita lex scripta est*, and the statute must be followed.

In *Lehigh Valley Ins. Co. v Fuller et al.*, 81 Pa. St., 398, service in certain cases was required to be made upon "the agent or clerk of said defendant at the usual place of business or residence of such agent or clerk." The return showed *personal service* on the agent without showing that it was "at the usual place of business or residence."

Held not good. The Court say: "The legislature has seen fit to provide that the service shall be 'at the usual

place of business or residence' of the agent and in no other way. A *personal service* is not sufficient. Why, it is not our place to inquire. *Ita lex scripta est.*"

In *State v. Bernal*, 43 Cal., 385, the Court say: "In making service of a summons, and in the return of such service, the provisions of the statute must be, and must be shown to have been substantially observed and followed by the officer, otherwise the proceedings can not be supported upon a direct appeal taken."

In *Brisbane v. Peabody*, 3How. Pr., 109, publication served in state paper and *Buffalo Courier*, and had in state paper and *Buffalo Commercial Advertiser*. Held not good, and Court say: "The statute requires the notice to appear, to be published in the state paper and such other paper as the Court shall direct. In this case the Court directed it to be published in the *Courier*. This was not done, but the publication was made in the *Commercial Advertiser*. *It is immaterial whether the defendant has been prejudiced by this change.* The court acquired no jurisdiction of the party and had no right to order the bill taken as confessed."

In *Williams v. Van Valkenburg*, 16 How. Pr., 144, the copy of summons was delivered to defendant's father, supposing him to be the defendant, at the residence of the defendant and his father, and was immediately afterward delivered to the defendant by someone in the house. Held not good service.

In *Sheldon v. Comstock*, 3 R. I., the statute required the leaving of a copy "at the defendant's usual place of abode with some person there." Return showed that a copy was left "by direction of defendant with the defendant's attorney, Paul Ladd, in whose hands defendant stated his affairs to be placed." Held not good service, and the court say: "Where the law prescribes any particular forms or proceedings in the service of process, the return of the officer should show *that they were specifically complied with.*

In *Waddington v St. Louis*, 14 Mo., 190, the statute re-

quired the service to be made by reading the petition and writ to the defendant, or delivering a copy of them to him. The return showed the *reading* of the writ to the defendant and the *delivery* of a copy of the petition to him. Held not good. *Both the writ and petition* must be *read*, or copies of *both* must be *delivered* to the defendant. The reading of the one and delivery of copy of the other is not sufficient.

This court has frequently and in a variety of cases in addition to those mentioned above, enforced the doctrine that service of process must be strictly in the manner prescribed by law.

In *Mayer v. Griffin*, 7 Wis., 82, held, leaving copy of summons with defendant's hired man, not a compliance with statute requiring it to be left with some member of his family.

In *Rape et al. v. Heaton*, 9 Wis., 328, return of service on two defendants "by leaving a certified copy with his family, in their residence," held not to show service on either.

Service by leaving at usual place of abode will not be good unless it appear also that defendant *could not be found.* (*Knox v Miller*, 18 Wis., 397. *Northrup v. Shephard*, 23 Wis., 513.)

Affidavit of service by other than officer must state that affiant knew the person served to be the defendant.

(*Grantier v. Rosecrance*, 27 Wis., 488), that a copy was *left with* as well as *delivered to* defendant. (*Matteson v. Smith et al*, 37 Wis., 333; *Hall v. Graham*, 49 Wis., 553), and the *place* of service, (*Sayles v. Davis*, 20 Wis., 502; *Weis v. Schoerner et al.*, 53 Wis., 72).

In *Wendel v. Durbin*, 26 Wis., 390, failure to endorse on copy served date of service pursuant to chapter 68, Gen. Laws of 1869, held fatal to an attempted service otherwise regular.

In *Wetherbee v. Wetherbee*, 20 Wis., 499, *personal* service out of the state with written admission of such service and

agreement to waive all other service, held not good service, where no order of publication had been made.

In *Lickens v. McCormick et al.*, 39 Wis., 313, mailing copy of summons and complaint to defendants, directed to them by name of their firm, giving initials only of their Christian names, held not a compliance with the statute requiring mailing copies to defendants where service is attempted by publication.

Nor is this strictness enforced against corporations only. It maintains equally against individuals.

*State v. Bernal*, 43 Cal., 385.
*Williams v. Van Valkenburg*, 16 How. Pr., 144.
*Sheldon v. Comstock*, 3 R. I., 84.
*Waddingham v. St. Louis*, 14 Mo., 190.
*Settlemier v. Sullivan*, 97 U. S., 444.
*Patterson v. Busby*, 5 M. & W., 521.
*Rhemstedt v. Briescoe*, 55 Wis., 616.

Nor will the rule be at all relaxed by the fact that some other mode of service is more convenient, and will accomplish all the purposes of the statute, or that no good purpose is subserved by the statutory method. The conclusive answer to such arguments is the statute clearly requires the particular mode of service; *ita lex scripta est.*

*Helmes et al. v. Chadbourne et al.*, Exs., 45 Wis., 60.
*Lehigh Valley Ins. Co. v. Fuller et al.*, 81 Pa. St., 398.
*Brisbane v. Peabody*, 3 How. Pr., 109.
*Reynolds v. Orvis*, 7 Cow., 269.

2. As already stated, the manner of service prescribed by the charter for this city is "by leaving a copy of the process with the mayor" (Sec. 8, sub-ch. 9, chap. 327, Private Laws of 1856), by the Revised Statutes for cities generally, "by delivering a copy thereof to the mayor and city clerk" (Sec. 2637, R. S. 1878).

Thus the statute prescribes the manner of service, and because it does, that particular prescribed manner is ex-

clusive of any and all other modes of service. This is established doctrine, recognized and enforced in all the cases on the subject.

In *North v. Railroad Company*, 10 Ohio St., 548, the court say:

"The mode of service of summons upon the company prescribed by the act of March 21st," "directing the manner of serving mesne process against railroad companies, is exclusive of any and all other modes."

*Weil v. Green County*, 69 Mo., 281, the statute required service on a county to be made by leaving a copy of the summons "with the clerk of the county court fifteen days at least before the return day thereof, and the court held "that special manner of service must be regarded as exclusive, since there can be no doubt of the power of the legislature to regulate the service of process. Whether the law respecting the particular way of serving process on the county, is an evil one, is not a matter of judicial concern."

In *Dewey v. Central Car and Manufacturing Company*, 42 Mich., 399, the statute required service of process against certain corporations, to be "made on the president, secretary or agent," or if absent from the county wherein their business office is located, by "posting a true copy in some conspicious place at the business office of the company in said county." Personal service on the company's president out of the county wherein its business office was located, held not service on the company; and the court after citing the statute, say:

"Now only two modes of service are here authorized. First, on the president, secretary or agent, if found within the county where the business office is located, and if they are not found within that county, then second, by posting at the business office within such county.

"There is no middle course. The method of posting is absolute and exclusive, if those upon whom the law authorizes service are out of the county. No service can be made

in a foreign county. Whether it is effected on the president, secretary or agent, or by means of posting, it must be done in the county where the business office is fixed, and the effect is to exclude courts which are not empowered to have their process served in the county containing the office."

In the *City of Watertown, imp., v. Robinson et al.*, 69 Wis., 230, where the service relied on was even more complete than here, the court say:

"When the statute designates a particular officer to whom the process may be delivered, and with whom it may be left, as service upon the corporation, no other officer or person can be substituted in his place. The designation of one particular officer upon whom service may be made excludes all others. The temporary inconvenience arising from a vacancy in the office of mayor affords no good reason for a substitution of some other officer in his place upon whom service could be made, by unwarrantable construction not contemplated by the statute."

3 The service is to be made upon the city, not upon an individual. The corporate entity is to be reached and jurisdiction of it acquired. It is impossible to deliver process to it, because it is intangible. But it has a number of officers acting for it, and in its name, and of different grades from mayor, "the one principal officer," down. The legislature has selected from all these officers, the mayor, and designated him as the one to whom process must be delivered, to constitute service on the city. The legislature having, under such circumstances, designated one of these officers, it is not within the power of any court, we submit, to designate another. The familiar maxim, *expressio unius est exclusio alterius*, often announced and applied by this court forbids it.

*United States v. Arredondo et al.*, 6 Pet, 691–725.
*Conroe v. Bull*, 7 Wis., 408.
*Crawford et al. v. Hastings*, 10 Wis., 525.

4. The statute says service on the city shall be made "by leaving a copy of the process with the mayor." To hold that leaving it with the chairman of the board of street commissioners during a vacancy in the office of mayor, is good service under the statute would be "incorporating into the law, by judicial construction, material provisions which the legislature did not think fit to adopt." The court would thereby amend the statute so as to read "by leaving a copy of the process with the mayor, *or with the chairman of the board of street commissioners if the office of mayor be vacant.*" That would "be taking an unwarrantable liberty with this language," as was said by this *court in Hanson et al. v. Taylor*, 23 Wis., 547.

Courts cannot dispense with a legislative requirement, however urgent may be the demand, and this court has frequently declared this doctrine. In *Harrington v. Smith*, 28 Wis., 43, at page 65, it said:

"And as to the other branch of the argument or claim that the making of the certificates is useless or might have been conveniently or properly omitted, I have only to say that we do not sit here to reverse or correct the action of the legislature in such matters. We have no legislative power, and cannot dispense with a certificate because it may be shown that the legislature might have conveniently or wisely done so. The construction of the law belongs to this court, but not its policy, and we cannot look to reasons of that kind for disregarding the plain requirements of a constitutional enactment. The legislature may, if it chooses, require that to be done which to others seems idle and useless. It is for the legislature, and not for the court, to judge whether it is so."

*Leffingwell v. Warren*, 2 Black, 599.

*Kendall v. United States*, 107 U. S, 123.

We then have in this case the statute prescribing the manner of service to be "by leaving a copy of the process with the mayor." We have the rule of law declaring that

particular described manner of service, exclusive of any and all other modes of service. Next we have this particular isolated case, wherein by reason of the office of mayor being vacant a copy of process cannot be left with him. What now is the result? Only this, that service cannot be made in this case so long as the vacancy continues, because during that time it cannot be made in the manner prescribed by law. And because it cannot be made in the manner prescribed by law, is certainly no reason why the court should decide it may be made in a manner not prescribed by law.

## III.

Vacancy in the offices of mayor and president of the common council, does not, (as claimed), make the chairman of the board of street commissioners the proper officer under the statute to serve process upon in actions against the city.

I. Such vacancy could effect that result only by either

1st. Abrogating the rule of law as to service above stated, that where the statute prescribes a particular manner of service, that particular statutory method must be pursued.

2d. Abrogating the statutory requirement as to service above quoted, that service upon the city shall be "by leaving a copy of the process with the mayor," or,

3d. Making the chairman of the board of street commissioners mayor.

(a). That it can effect neither of the first two results, is a proposition too plain to need discussion. The existence of the rule and of the statute in no way depends upon the existence or non-existance of that or any other fact. A change of

facts or circumstances cannot alter an established rule of law or a provision of statute duly enacted; that can be done only by the legislature, and until so done, the rule and statute must stand and receive the willing obedience of both courts and suitors.

(b). The vacancy does not make the chairman of the board of street commissioners mayor. By Sec. 1, chap. 204, P. & L. laws of 1871 of Wisconsin, which is the act creating the board of street commissioners, it is provided, among other things, as follows:

"The mayor may preside at the meetings of said board and they may elect a chairman who shall preside in his absence," "and in case of vacancy in the office of mayor, and there is no president of the common council to act, said orders (on the treasurer) may be signed by the chairman of said board and the city clerk."

This is the only statute conferring any powers on the chairman alone. It was so held in the *City of Watertown, imp. v. Robinson* 69 Wis., 230 at page 235, which will be further considered presently. Vacancy, then, in the offices of mayor and president of the common council, effects the chairman of the board of street commissioners in this particular only, that it enables him to preside over meetings of the board and to sign orders on the treasurer. It clearly does not make him mayor.

Hence, notwithstanding such vacancy, the rule of law requiring the statutory method of service to be pursued still obtains, the statutory provision requiring copy of the process to be delivered to the mayor still remains, and the chairman of the board of street commissioners still continues such chairman, with no additional powers or functions except to preside at board meetings and to sign orders.

2. It is claimed that the chairman of the board is clothed with all the powers and exercises all the functions of mayor of the city during a vacancy in the office of mayor, and that, therefore, leaving a copy of process with him during such

vacancy constitutes good and sufficient service thereof upon the city. We controvert this position both as to its conclusion of law, and statement of fact.

1st, Conceding that the chairman of the board is clothed with all the powers and functions of mayor, during a vacancy in the office of mayor (which, as will presently be seen is not so), what follows? Only this: That there are two officers in that city with like powers and duties. Clearly it is within the power of the legislature, indeed it is its duty, to designate which one of those two officers process must be delivered to in order to constitute service upon the city. And having designated one of them the process must be delivered to that one, and not to the other.

*Charleston v. Lunenburgh*, 21 Vt., 488.
*Fairfield v. King*, 41 Vt., 611.
*S. S. Mining Co. v. Marsano*, 10 Nev., 370.
*Chambers v. Bridge Manf. Co.*, 16 Kan., 270.

The Vermont statute required service on a corporation to be made "by leaving a copy with the clerk thereof." The statute relating to towns created, among others, two officers, town clerk and assistant town clerk. Both were required to give bonds. The assistant was clothed with all the powers and duties of the town clerk in the absence of the latter from his office. The process was delivered to the assistant in the office during such absence; the court held it was not service on the town.

In the Kansas case above cited, the court speaking of the service, say: "It must be made upon the person who *holds the office designated* without regard to whether he discharges any of the duties of that office." The same doctrine that the process must be left with the person holding the office, *eo nomine*, not with one merely discharging its duties, is declared in *Sacramento v. Fowler*, 21 Wall, 119 and *Alexandria v. Fairfax*, 5 Otto, 774.

Identity of powers, therefore, cannot render the chairman the proper officer to whom to deliver process in suits against the city, nor make service on him service on the city.

Service on the city under the statute does not involve any question of the powers of the mayor. It is simply the act of leaving the copy with him. It is a power, not of the mayor in any sense, but of the plaintiff or of the officer acting for him. It comes upon the mayor *in invitum*, and he has no power to exercise or duty to perform, respecting it. When the service has been completed by the leaving of the copy, then, but not till then, he has a power to exercise and a duty to perform, respecting it, to wit: "Forthwith to inform the common council thereof, or take such further proceedings as the ordinances or resolutions of said council may provide." This court upon petition presented to it by the petitioner may issue its writ of habeas corpus But the presentation of the petition is not a power of the court, nor does it involve the exercise of any of its powers or functions. So no power or function of the mayor is involved in serving process on the city which is simply leaving a copy with the mayor.

This precise question was passed upon in *Fairfield v. King*, *supra*.

Section 24, of the statute, required all writs against a corporation to be served "by leaving a copy with the clerk thereof, unless he be absent from the state," and if so absent, "with one of the principal officers of the corporation." The assistant town clerk, an officer created by statute, was required to give the official bond and to discharge all the duties of town clerk in the latter's absence from his office or inability to act. The clerk's office was in a building occupied by the assistant, a quarter of a mile from the clerk's

house. For upwards of ten years the assistant had had charge of the office and discharged the duties of clerk, the latter paying little or no attention to it himself. A copy of the writ was left with the assistant in the office of the clerk, in the latter's absence therefrom. It was claimed that because the assistant, under the statute possessed all the powers of the clerk in the latter's absence, leaving the copy with him was service on the town. But the court held it was not, and on the subject say:

"The provision first referred to prescribes the mode in which service shall be made upon a town or other corporation, and no provision is made in the statute for service in any other manner, except when the clerk is absent from the state. The twenty-fourth section has no reference to the duties of the town clerk; nothing is required of him and there is nothing in the statute that imposes upon him any duty in respect to the writ or suit, where service is made upon the town by leaving a copy with him. He is simply made the officer to whom notice is to be given, and through him to the town, not by any act of his, but by operation of law. When the copy is left with him the town has legal notice of the pendency of the suit, and the plaintiff in the suit can proceed to take his judgment by default. The legislature probably contemplated that the town clerk would notify the officer whose business it might be to look after the interests of the town in such matters, but no such duty is imposed upon him by statute. *The statute simply prescribes the duty of the officer serving the writ, nothing more.*"

The mayor has only such powers as are specifically conferred upon him by the charter, and the latter nowhere clothes him with such a power as "that of receiving service of process in suits against the city." In making such service he has nothing whatever to do, either in the way of receiving or refusing to receive service. The latter becomes finished by leaving with him the copy, and, that being done,

is just as perfect and complete when he refuses as when he receives the copy. Leaving the copy with him, alone and of itself, constitutes perfected service without any act of any kind on his part. If the service is in any way dependent upon his receiving or refusing to receive it, then his refusal would prevent service, although the copy should be duly left with him. But such refusal does not affect the service.

*Fuller v. Kenny*, 32 Me., 334.
*Story v. Ware*, 6 George, 399.

If by the mayor's power to receive service, is meant his power to make a written admission of service, then we say such admission does not constitute service, but only evidence that what the statute requires to be done to constitute service, has been done. But notwithstanding such admission, if the copy has not in fact been left with him, there would be no service on the city.

*Gaylord v. Payne et al.*, 3 Conn., 259.
*Bridgeport Savings Bank v. Eldridge*, 28 Conn., 556.

In the last case it is held that neither the president nor attorney of a corporation, has power to admit service of process upon it. And while the president there was the officer to whom copy of process was required to be delivered to make service on the corporation, yet nothing short of such delivery would constitute such service, although he had admiited due service.

But even if the powers of the chairman were in all respects identical with those of mayor, still he would not be mayor. And this is well illustrated by the recent case of *Board of Commissioners of Excise, etc., v. Burtis, et al.*, 103 N. Y., 136.

There the excise law required actions for its penalties to be brought in the name of the overseers of the poor of the town or city in which the penalty was incurred, except in

such towns or cities as had no overseers of the poor, in which case the action should be brought in the name of the board of commissioners of excise of said town or city. The city of Auburn from its incorporation to 1879, had overseers of the poor. In 1879, its charter was amended by creating a board of charities and police, and declaring that "said board shall possess the powers and execute the duties of overseers of the poor." Yet it was held that such board did not become the overseers of the poor, and that actions for excise penalties in the city of Auburn, must be in the name of the board of commissioners of excise.

*Bennett v. United States*, 2 Wash. Ter., 179.

3. It is contended by defendant in error that because the statutory service cannot be made while the office of mayor is vacant, some other mode of service may then be resorted to or sanctioned by the court. But this proposition is clearly untenable.

The city is the creature of the statute and derives from that all its powers, duties and obligations. The provision fixing the mode of service is mandatory, unqualified and without condition. If that provision be defective, the legislature, not the court, must remedy the defect.

This precise question was passed upon, after full argument on both sides, in *Perkins v. The City of Watertown*, 5 Bissel, 320. Three copies of the process had been delivered, one to the mayor elect before he had qualified, and one each to the city clerk and city treasurer. It was shown also that there was no mayor or acting mayor upon whom service could be made. And it was claimed that because statutory service could not be made, some other mode might be resorted to or allowed by the court, and the same reasons were urged there as here, but the court, in a well-reasoned opinion, held otherwise, and said:

"The charter of the city authorizes suits to be commenced against it by the service of process upon the mayor, and the question now presented is *whether it can be served*

*upon any other officer or party so as to give this court jurisdiction* * * * The corporation is created by the state legislature, its powers and rights emanated from that source, and if there are defects in the organic law, it is for the legislature and not the courts to correct them. * * * It was stated and shown by the papers that there was no mayor or acting mayor upon whom service could be made under the statute; *but that does not augment the power of this court, or confer upon it legislative authority.* Courts must administer the law as they find it, not supply defects in legislation when a difficult or hard cause presents itself. Such considerations are to be addressed to the law making power, not to the courts."

In *Poor v. Considine*, 6 Wall., 458, the court say, respecting a clause they were asked to construe: "The language of this clause is plain and unambiguous. There is nothing in the context, rightly considered, which qualifies or affects it. There is, we think, no room for construction. * * *

"Were we to adopt the construction claimed by the plaintiff's counsel, instead of adjudicating, we should legislate. This we have no power to do. Our function is to execute the law not to make it."

In *United States v. Graham*, 110 U. S., 219, it is said:

"But with language clear and precise and with its meaning evident, there is no room for construction and consequently, no need of anything to give it aid. The cases to this effect are numerous."

In *Thornley v. The United States*, 113 U. S, 310, the court say:

"Where the meaning of a statute is plain it is the duty of the court to enforce it, according to its obvious terms. In such a case there is no necessity for construction."

*Edwards v. Darby*, 12 Wheat., 206.
*United States v. Temple*, 105 U. S., 97.
*Swift Company v. United States*, 105 U. S., 695.
*Ruggles v. Illinois*, 108 U. S, 526.

Where the legislature makes a plain provision without making any exception, the court can make none.

*French v. Spencer*, 21 How., 228.

*Yturbide v. United States*, 22 How., 290.

The Supreme Court of Wisconsin holds the same doctrine.

In *Mundt v. Sheboygan & Fond du Lac R. R. Co.*, 31 Wis., 451, the court say, on page 457:

"Courts cannot correct supposed errors, omissions or defects in legislation. The office of interpretation is to bring out the sense where the words used are in some manner doubtful, and where these are plain and unambiguous, the court cannot depart from the language of the statute. This court has too often of late had occasion to repeat and enforce these rules, to permit them now to be called in question or disregarded. It is only where the intention of the legislature is ambiguously expressed, so as to be fairly capable of two or more meanings, that interpretation or any latitude of construction is allowable. It is only in such cases that the courts are at liberty to accept or act upon what is termed the doctrine of equitable construction."

Impossibility to make statutory service is not an element to be considered in determining its necessity. All that results from such impossibility is, that the party cannot be sued during its continuance, for the simple and all-sufficient reason that service cannot be made in the manner prescribed by law.

And this is no novel doctrine It maintains as well in suits against individuals as against corporations. If service on an individual is required by statute to be personal, and he be absent, suit cannot be commenced against him. Unless the statute itself provide for a substituted service in case of absence, as by leaving a copy of the process at his residence he cannot be sued, and for the simple and only reason that a copy of the process cannot be left with him as prescribed by statute.

Nor will the necessity for statutory service be at all obviated by the fact (even if it exist), that the party has sought to avoid such service, and has purposely put himself in such position that it cannot be made. This doctrine was fully established in the long controversy with the anti-renters in New York. There the statute provided for personal service of process without providing for any substituted service in case personal service could not be made. Associations were formed for the avowed purpose of preventing service. Preconcerted signals, such as the blowing of horns, were used to warn tenants of the approach of officers with process to serve. Sometimes the officer would approach within ten or fifteen feet of the party before his presence would be known, and then the party would flee. At other times the officer would enter defendant's dwelling while he was in, and the latter would secrete himself in the garret and bar the way to his hiding place, so that a copy of the process could not be delivered to him. And yet the courts held that none of these facts, nor all of them combined, relieved the suitor from complying specifically with the manner of service prescribed by statute, which was a delivering of a copy of the process to the party.

*Van Rensselaer et al., Exs., etc. v. Palmatier*, 2 How. Pr., 24.

*Van Rensselaer et al., Exs., etc , v. Petrie*, 2 How. Pr., 94.

And this doctrine is recognized and enforced by this court in *Rees v The City of Watertown*, 19 Wall., 107. There the equity powers of the court were invoked on the ground that the city, by the same means here complained of, had rendered it impossible to pursue the legal remedy. But the court held that such impossibility did not authorize some other remedy to be pursued. And its language as follows on page 124, is especially authoritative and instructive here:

"The writ of mandamus is, no doubt, the regular remedy in a case like the present and ordinarily it is adequate and its results are satisfactory. The plaintiff alleges, however, in the present case, that he has issued such a writ on three different occasions; that, by means of the aid afforded by the legislature and by the devices and contrivances set forth in the bill, the writs have been fruitless; that in fact, they afford him no remedy. The remedy is in law and theory adequate and perfect. The difficulty is in its execution only. The want of a remedy and the inability to obtain the fruits of a remedy are quite distinct, and yet they are confounded in the present proceeding. To illustrate: The writ of *habere facias possessionem* is the established remedy to obtain the fruits of a judgment for the plaintiff in ejectment. It is a full, adequate and complete remedy. Not many years since there existed in central New York combinations of settlers and tenants disguised as Indians, and calling themselves such, who resisted the execution of this process in their counties, and so effectually that for some years no landlord could obtain possession of his land. There was a perfect remedy at law, but through fraud, violence, or crime, its execution was prevented. It will hardly be argued that this state of things gave authority to invoke the extraordinary aid of a court of chancery. The enforcement of the legal remedies was temporarily suspended by illegal violence, but the remedies remained as before It was the case of a miniature revolution. The courts of law lost no power, the court of chancery gained none. The present case stands upon the same footing. The legal remedy is adequate and complete, and time and law must perfect its execution."

The case of *Bockway v. Oswego Township*, 32 Kansas, 221, is a direct and instructive authority on the proposition, that impossibility to make, does not dispense with, statutory service on a corporation even though such impossibility is intentionally occasioned by defendant. There the

plaintiff sought to serve upon the defendant notice of motion to revive his judgment previously recovered against the town. The sheriff returned that after diligent inquiry, he could not find the trustee, clerk or treasurer (the officers to whom the statute required process to be delivered). Affidavit was then filed that the trustee, clerk and treasurer, if elected, had failed, neglected, and refused to qualify; that there was no trustee, clerk or treasurer of the town, and no officer or person upon whom service could be made; that the town failed, neglected and refused to elect, or permit its trustee, clerk or treasurer to qualify, with the intent and purpose to avoid service, and by so failing, neglecting and refusing to elect or to permit such officers to qualify, or to designate some person upon whom service could be made, concealed itself with intent to hinder, delay and defraud its creditors. Plaintiff then caused notice of his motion to revive to be published pursuant to the statute providing for service by publication in case of concealment of a party. It was claimed there as here, that as defendant by its own acts had purposely rendered statutory service impossible, service by publication was necessary and proper. But the court held the service insufficient, and said:

"Such action or failure to act on the part of the township or on the part of its officers, may be troublesome to the creditors of the township, and work great injustice; but the remedy for such a condition of affairs is with the legislature, not with the courts. The action or non-action of Oswego Township does not justify us in saying that the township conceals itself. The township, is still an organized township of the state, and a body politic and corporate; it has its boundaries, its people and its property, all within the state and all visible, and does not in fact conceal itself. Therefore, although it has no officers upon whom process can be served, it cannot be brought into court by publication."

Consider the position the court is invited to assume when

asked to hold that because service cannot be made in the manner prescribed by the statute some other mode of service may be resorted to. A suitor comes into court and says, I cannot get service of my process in the manner prescribed by law, I cannot comply with the statute. The court says you need not. The statute, we know, requires you to do thus and so, but you need not; if you will only do something else we will allow you to proceed, although the statute enacted for your government and ours, requires you to do that of which we now here relieve you. That is, if you cannot secure your rights in a legal manner, you may secure them in an illegal manner, for every party is entitled to a speedy remedy in the law; and justice must be denied to none.

4. The Supreme Court of Wisconsin, when the controversy in the Robinson cases was first before it in *The City of Watertown vs. Robinson et al.*, 59 Wis., 513, intimated that a very serious question might be involved, under section 9, of the Bill of Rights in view of counsel's claim that it was not within the power of the legislature to create a municipal corporation with all the powers and franchises incident thereto and exempt it from the power of being sued.

While that court properly met and disposed of that question when the controversy was next before it in *The City of Watertown, imp. v. Robinson*, 69 Wis., 230, we deem it prudent to submit, briefly, our views on that question.

No such condition of things as is implied in counsel's claim referred to, exists respecting the city of Watertown. The legislature has not exempted or attempted to exempt it from the power of being sued, or made or attempted to make it unamenable to judicial process.

The provisions of the charter and revised statutes respecting service, apply to it just the same as they do to any other city in the state, and they render it to-day just as much amenable to judicial process and the power of being sued as is any other city in Wisconsin. The difficulty com-

plained of here is, not that the city is by statute unamenable to judicial process or the power of being sued, but that the officer to whom process is required to be delivered by the statute making it amenable to judicial process and the power of being sued, resigns and cannot be reached by suitors. As said by the Supreme Court of the United States in *Rees v. City of Watertown, supra*, "The remedy is in law and in theory adequate and perfect. The difficulty is in its execution only. The want of a remedy and the inability to obtain the fruits of a remedy are quite distinct." The difficulty in the case at bar is the same as was encountered in the Rees case and in the controversy with the anti-renters; it is in the execution of the remedy, not its existence.

We also submit that section 9 of the bill of rights, being sec. 9, art. I, of the constitution of Wisconsin, does not effect the question involved in this case. It reads as follows:

"Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws."

The Supreme Court of Wisconsin has frequently considered this section and uniformly held that its entire scope, so far as concerns the question here involved, is simply to avoid statutes which would deprive parties of a substantial remedy according to the course of justice as it existed at the time their contracts were made. But, "all the authorities agree that it is within the power of the legislature to repeal, amend, change or modify the laws governing proceedings in courts, so that they leave the parties a substantial remedy, according to the course of justice as it existed at the time the contract was made."

*Von Baumback v. Bond et al.*, 9 Wis., 559.

*Oatman v. Bond et al.*, 15 Wis., 20.

*Soutter v. City of Madison*, 15 Wis., 30.
*Wakely v. Nichols*, 16 Wis., 588.

The charter provision respecting service of process has been the same that it now is, ever since 1856. See section 8, sub-chapter 9, of chapter 327, P. and L. laws of 1850. So that the same remedy and mode of procedure is secured to defendants that existed at the time and for many years before the injury complained of occurred. Hence there is no legislation here obnoxious to section 9 of the Bill of Rights.

But if there were, it would not affect the question here. This section of the Bill of Rights, like every other constitutional provision, simply avoids any statute within its interdict. It reaches no further. The rights of the parties remain precisely the same as if the obnoxious statute had not been passed. If then all the legislation creating the board of street commissioners and conferring on it and its chairman certain powers, is within the interdict of section 9 of the Bill of Rights, it is void, and the rights of the parties remain precisely the same as if it had never been enacted. But the provision of the charter and revised statutes as to service, requiring delivery of a copy to the mayor, still remains in full force unaffected by the obnoxious legislation. Section 9 of the Bill of Rights, therefore, has no bearing on the question at issue here.

## IV.

The chairman of the board of street commissioners is not, at any time or under any circumstances, clothed with all the powers, nor does he exercise all the functions of mayor, but is always an officer much inferior to the latter.

1. The mayor is, by the charter, the "one principal officer" of the city, and a component part of the common council.

Section 4, chapter 233, General Laws 1865.

Section 1, sub-chapter 3 of chapter 233, General Laws 1865.

He is elected annually at the annual city election, by the people voting by ballot, and holds his office for one year, and until his successor is elected and qualified.

Secs. 5, 6, 7 and 8, ch. 233, General Laws 1865.

2. The mayor is clothed with two distinct and separate classes of powers, to wit: Those which he possesses as the "one principal officer" of the city and, secondly, those which he possesses as a component part of the common council.

In the first class are embraced the powers which he exercises individually and not jointly with others, such as presiding over meetings of the common council, seeing that the laws and ordinances are enforced and obeyed, and that all city officials discharge their duties, appointing the city police, communicating annually to the common council, voting in case of a tie, administering oaths and taking acknowledgments. (Sec. 2, sub-chap. 2, of chap. 233, G. L. 1865), calling special meetings of the common council, (sec. 2, sub chap. 3, of chap. 233, G. L. 1865), designating place of meetings of fire companies (sec. 4, sub chap. 8, of chap. 233, G. L. 1865), signing ordinances, etc. (sec. 5, sub chap. 3, of chap. 233, G. L. 1865).

The second class comprises the powers which he posesses as a component part of the common council, such as enacting ordinances, by-laws, etc. (sub chapter 3 of charter), opening and vacating streets (sub-chapter 4), levying taxes (sub chapters 5 and 6), forming and equipping fire companies (sub-chapter 8).

Such are the two classes of powers conferred by the

charter upon the mayor. While in the exercise of these powers, the board of street commissioners was organized under chapter 204 of the Priv. and L. Laws of 1871. That act constitutes the senior aldermen of the several wards of the city a board of street commissioners. The powers of the board as prescribed by that act, are only to audit and allow accounts against the city and the several wards for current expenses, to elect a chairman to preside in the mayor's absence, compel the attendance of absent members, approve the purchase of lots or sites for school houses by the board of education, and all powers conferred by the charter on the common council in relation to streets, bridges and sidewalks, and to canvass the returns of election for city and ward officers. The chairman is authorized to sign orders only in case of vacancy in the office of mayor and there is no president of the common council to act. The powers thus conferred on the board are to be thus exercised "subject to the regulation and control of the common council."

Sec. 1, ch. 204, P. and L. Laws of 1871.

Thus it will be seen this board of street commissioners is composed of only one alderman from each ward, not indeed enough to constitute a quorum of the common council (section 1, sub-chapter 3 of chapter 233). It is only a committee of the council, exercising for it and subject to its control, some of its powers.

The chairman of this board is elected from its members by a vote of its members, and under this organizing act has no powers whatever, except in the mayor's absence, and then only the power to preside at meetings of the board and sign orders.

Certainly under this act, this chairman is an officer much inferior and subordinate to the mayor.

Chapter 2, private and local laws, 1872, conferred upon the board of street commissioners all powers conferred by

law upon the common council in relation to public schools, police, fire department, nuisances, regulation of slaughter houses and the public health, subject to the regulation and control of the common council; but prohibited it from levying taxes for any purpose.

While this act increased the powers of the board of street commissioners, it still kept it subject to and as a committee of the common council. It, however, conferred no additional powers on the chairman. He still could only preside at meetings and sign orders, and that only in the mayor's absence.

Then came chapter 46 of the laws of 1879, the second section of which is as follows:

"The board of street commissioners of said city and the chairman of said board shall have concurrent power with the mayor and common council of said city in the appointment of inspectors and clerks of election, and shall have all other powers conferred by law upon said mayor and common council, subject to the control of said common council, except the power of levying taxes, which they shall not have in any case whatever."

This statute also still continues the board and its chairman subject to the control of the common council, and requires it to exercise its powers subject to that control. It withholds from them the very important power of levying taxes, which is still confided solely to the mayor and common council.

This statute, it will be observed, also, does not confer any additional powers upon the chairman of the board acting alone and as such chairman. It confers upon the board and the chairman, acting together and jointly, all the powers conferred by law upon the mayor and common council, acting together and jointly, except the power to levy taxes.

Dillon's Municipal Corporations, 3d Ed., p. 123–4, *Day v. Green*, 4 Cush., 433.

The statute does not pretend to confer upon the chairman

any of those powers which the mayor exercises individually as the "one principal officer" of the city. Its whole object and purport were simply to confer on the board and its chairman acting together and jointly, the joint powers of mayor and council acting together, and it makes even the exercise of these powers subject to the control of the common council.

So that the chairman of the board of street commissioners alone and as such, has no powers whatever, except in the mayor's absence and then only the power to preside at the meetings of the board and sign orders.

The Supreme Court of Wisconsin so decided in *the City of Watertown imp. v. Robinson*, 69 Wis.; 2 0, and at page 235 said:

"The person or officer upon whom this pretended service was made is the 'chairman of the board of street commissioners,' and sec. 2, ch. 46, Laws of 1879, prescribes the duties of such an officer in connection with said board, as follows: 'The Board of Street Commissioners of said city, and the chairman of said board, shall have concurrent power with the mayor and common council of said city in the appointment of inspectors and clerks of election, and shall have all other powers conferred by law upon said mayor and common council, subject to the control of said common council, except the power of levying taxes, which they shall not have in any case whatever.' This provision confers upon the chairman alone none of the duties and powers of the mayor. In sec. 1, ch. 204, P. & L., Laws of 1871, are found the only other powers of the chairman. They are: 'In case of vacancy in the office of mayor, and there is no president of the common council to act, said orders may be signed by the chairman of said board,' etc. The mayor may preside at the meetings of said board, and they may elect a chairman who shall preside in his absence.' We can find no where that the chairman, as an officer, possesses any other powers or discharges any other duties of the mayor. His powers,

even in connection with the board of street commissioners, are special and strictly defined and limited, and 'subject to the control of the common council,' which consists of the mayor and aldermen. This officer falls far short of having the powers, duties or designation of the mayor, *and he is neither within the terms or spirit of the law requiring such service to be made upon the mayor.*"

Thus it will be seen that there is an eminent propriety in requiring the delivery of a copy of the process to the mayor in suing the city.

He is by the charter made the "one principal officer" of the city. He is required to be elected annually at the annual city election by the people voting by ballot. He is clothed with all the powers usually conferred upon the head officer of municipalities. He was therefore the proper officer upon whom to require service to be made in order to sue the city.

But not so with the chairman of the board of street commissioners. He is not elected by a vote of the people or at any election, or at any stated time, but is chosen by the board at any time they may see fit. He has no power whatever, except in the absence of the mayor, and then only the power to sign orders and preside at the meetings of the board. He is therefore a very improper officer upon whom to require service to be made in order to sue the city.

The argument of the learned counsel for the plaintiff in error is that the statutes creating the board of street commissions, abolished the mayor and common council. But those statutes are themselves a complete refutation of that argument. They everywhere recognize the continued existence of the mayor and common council. The board itself is formed out of a part (less than a quorum) of the council. Its meetings are to be presided over by the mayor, and only in his absence by a chairman to be selected by the board. The board possesses some of the powers of the council, but the most important of the powers to levy taxes, is specifically reserved to the council, and denied to the board.

Such powers as the board thus possesses, it can exercise only subject to the control of the common council.

## V.

Even if delivery to the chairman subserves every purpose of a delivery to the mayor and accomplishes all the objects of the statute, yet it should not be held service on the city. The conclusive answer to the defendant in error's argument here is, the statute requires it to be delivered to the mayor, and *ita lex scripta est.*

In *Helmes et al. v. Chadbourne et al., Exs.*, 45 Wis., 60, service on minors under fourteen, living with their mother, also a defendant, was attacked and held invalid on the sole ground that a copy of the process was not left with the mother as such for the infants, although a copy had been left with her as defendant and also with each infant. The court uses the strong language shown on pages 22 and 23 of this brief.

In *Foster v. Hammond et al.*, 37 Wis., 185, the court used the following strong and pertinent language on the same subject:

"It is said that the difference is immaterial; that one way is as favorable to non-resident defendants as the other. Perhaps so; but *ita lex scripta est.* We cannot sustain the statutory jurisdiction of the court below over the appellant, because the proceeding which was taken to acquire it, *out* of the statute, may be as good as the proceeding prescribed *in* the statute, which was not taken."

Equally direct and positive is the language of the court on that proposition in *Harrington v. Smith*, 28 Wis., 43, and

*Mundt v. Sheboygan & Fond du Lac R. R. Co.*, 31 Wis., 451, heretofore cited.

In *Lehigh Valley Insurance Co. v. Fuller et al.*, 81 Pa. St., 398, service in certain cases was required to be made upon "the agent or clerk of the defendant at the usual place of business of such agent or clerk." The return showed personal service on the agent without showing that it was at his usual place of business or residence. It was held insufficient, the court saying:

"The legislature has seen fit to provide that the service shall be at the usual place of business or the residence of the agent and in no other way. *A personal service* is not sufficient. Why, it is not our place to inquire. *Ita lex scripta est.*"

## VI.

The affidavits considered in connection with the return make it clear that the service made was not the service prescribed by law.

1. The only provision of law creating or providing for the election of Chairman of the Board of Street Commissioners, is sec. 1, ch. 204, private laws of 1871, which, after creating the board, provides: "The Mayor may preside at the meetings of said Board, and they may elect a Chairman who shall preside in his absence. This evidently contemplates that the Board, at each successive annual organization thereof, shall elect one of its members Chairman to preside at all meetings held during its term from which the Mayor shall be absent. The member thus elected thereby becomes a permanent officer, whose tenure is limited only by the term of the board electing him. Once so elected, absence

of the Mayor from any board meeting during the term, *ipso facto*, makes him presiding officer of the meeting, without any new election.

2. The affidavits show that Thomas Baxter never was such officer. As senior alderman of the 3d ward, he was a member of the board from April 10, 1882, to April 7, 1883, and in the mayor's absence from certain meetings, was chosen chairman *pro tempore* to preside at those specific meetings only, but was never elected chairman of the board to preside at all meetings during the term from which the mayor should be absent. The distinction is between chairman of the board, and chairman of a meeting of the board, and is the same as exists between the president *pro tempore*, which the state and U. S. Senates are empowered to elect, and the senator named by the president of each of those bodies, in the absence of the president *pro tempore*, to perform the duties of the chair temporarily, The former continues in office during the session, while the latter's authority does not extend beyond a day's adjournment.

3. The affidavits further show that Baxter was not chairman of the board in any sense on the 23d day of December, 1882. At the last meeting in November, 1882, Voss was elected chairman *pro tempore* to preside at that meeting. At the next meeting held December 4, Baxter was chosen chairman *pro tempore* solely to preside temporarily at that particular meeting, which, after the transaction of its business on that day, adjourned *sine die*. The next regular meeting was held December 18, but no quorum being present, it adjourned without transacting other business. Next a special meeting was held December 27, at which Baxter was chosen chairman *pro tempore*, solely to preside at that particular meeting, which adjourned *sine die* after transacting its business that day. No other meeting was held in December or after until January 15, 1883.

By each of these elections he became and continued

chairman only during the meeting at which it occurred. So that the adjournment of the meeting of December 4, "terminated his official position as chairman, which he did not again assume until December 27."

Robert's Rules of Order, pages 102, 103, 110, 111.

The adjournment put an end to the occasion for his acting (which was the meeting), and with it his right to act as chairman.

*Heyes v. Walters*, 46 Ga., 386.

Even if the service involved a power of the Mayor, a *pro tempore* chairman could not exercise it, because he is chosen for no such purpose, but only to preside at a particular meeting.

*City of Jeffersonville et al. v. Patterson*, 32 Ind., 140.

## VII.

The statute provides how service shall be made on a corporation having no officer known to the plaintiff upon whom service may by law be made. It is section 4240, R. S.

While that section assumes to provide only when an attempt to commence an action shall be deemed equivalent to the commencement thereof within the meaning of the statutes of limitation, yet it is broad enough, we submit, to authorize service by publication in just such a case as this. Omitting words not affecting this case, it reads:

"An attempt to commence an action shall be deemed epuivalent to commencement thereof * * * when the summons is delivered with the intent that it shall be actually served, * * * if a corporation

organized under the laws of this state be defendant, to the sheriff or proper officer of the county in which it shall be established by law, or where its general business is transacted, or where it keeps an office for the transaction of business, or where any officer, attorney, agent or other person upon whom the summons may by law be served, resides or has his office; *or if such corporation has no such place of business or any officer or other person upon whom the summons may by law be served, known to the plaintiff * * * to the sheriff or other proper officer of the county in which plaintiff shall bring his action. But such an attempt must be followed by the first publication of the summons, or the service thereof within sixty days.*"

That is, an action against a corporation having no office, upon whom service may be made, known to the plaintiff shall be deemed commenced when the summons is delivered with intent that it shall be actually served to the sheriff of the county in which plaintiff shall bring his action, followed by the first publication of the summons within sixty days. So that publication of the summons within sixty days after such delivery to the sheriff is, or shall be deemed equivalent to the commencement of an action against a corporation organized under the laws of this state and having no officer known to the plaintiff upon whom service may by law be made.

Here then is a statute providing substantially how service shall be made upon a corporation under the very state of facts disclosed by the return in this case, and that is by publication; and the method thus provided is of course exclusive of all others under the authorities already cited.

GEO. W. BIRD,
DANIEL HALL,
*Att'sfor Def't in Error.*

FILED.
FEB 28 1889
JAMES. H. McKENNEY.
CLERK.

# Supreme Court of United States.

OCTOBER TERM, 1888.

No. 196.

HENRY AMY AND GUSTAVUS HOPPENSTEDT,

*Plaintiffs in Error,*

— vs. —

THE CITY OF WATERTOWN,

*Defendant in Error.*

## BRIEF NO. 2 OF DEFENDANT IN ERROR.

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DEMOCRAT PRINTING COMPANY, PRINTERS, MADISON, WIS.

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## BRIEF NO. 2 OF DEFENDANT IN ERROR.

The plaintiff in another like case asserted and argued at the circuit, the two following additional propositions:

1. That Rohr's resignation could not take effect or create a vacancy in the mayor's office until his successor was elected and qualified, and no successor having been elected and qualified, he was still mayor when served with process.

2. That chapter 61, P. & L. Laws 1867, and sec. 2, chap. 204, P. & L. Laws of 1871, relating to resignation of city officers, including mayor, impair the obligation of contracts, and are void as violating sec. 10, art. 1, of the Constitution of the United States, and section 9 of Wis. Bill of Rights.

While we are satisfied neither of these propositions can be sustained either upon reason or authority, yet they may be of sufficient importance to justify argument here, and we may deem it prudent, therefore, to submit our views upon them as follows:

# I.

**Rohr's resignation took effect upon its filing with the city clerk, and, without any acceptance or other act, ipso facto, vacated the office of mayor.**

At the time the bonds were issued, all city officers were authorized by the statutes then in force, to resign, and their offices became vacant upon their making their resignation without acceptance or other act. This proposition we discuss more fully, giving authorities at pages ——— of this brief. It is sufficient for the present thus briefly to refer to it.

1. The only ground upon which it is claimed the taking effect of the mayor's resignation, is deferred beyond its filing with the clerk, is that by the charter, he is to hold his office for one year, "and until his successor is elected and qualified," and the effect of this last clause, it is claimed, is to prevent his vacating his office until the election and qualification of his successor. Hence we need discuss under this head, only the effect of this provision of the charter.

The object of this provision, so generally found in statutes relating to official terms, is very well understood. It is not to restrict, hamper, restrain or in any way impede those officers in the exercise of any rights or privileges they may possess. It rather enlarges their rights, by lengthening in a certain contingency their official term. Its object is to simply stretch out an incumbent's term until his successor is qualified, so as to prevent a vacancy, *by the expiration of the official term.*

Dillon on Munic. Corp. (3d Ed.), Secs. 217 to 221.

In the contingency of the successor failing to qualify, this clause simply extends the incumbent's term beyond the definite time prescribed by the statute. It does this and noth-

ing more. It does not in any way interfere or pretend to interfere with his right to put an end to his term by resignation, before the time specifically named in the statute for its expiration. It might with as much force be said, that he was prevented from exercising his right of resignation because the statute limited his term to one year, for both provisions simply refer to and regulate the length of the official term, and nothing more. Thus under such construction, no officer could, in any event, resign his office.

The sole object of a resignation is to put an end to the official term before the time limited by law for its expiration. That is its purpose and only purpose. And it must of necessity be exereised by some one already in the office. Hence to say that the exercise of the right can terminate the incumbent's official position only when that very thing itself is accomplished by the expiration of his term under the statute or the qualification of his successor, is destroying the right and effectually preventing the sole object of conferring it.

The statutory provision that certain officers are to hold their office until a specific time named "and until their successors are elected and qualified," applies only when those officers have served out their full term as fixed by law, and has no application when they have resigned or otherwise vacated their office before the expiration of their full term of office.

*Baker v. Kirk*, 33 Ind., 517.
*Hyde v. State*, 52 Miss., 665.

These two cases are directly in point. They are center shots and ring the bell every time on this proposition.

2. The resignation of a municipal officer takes effect immediately upon its receipt by the officer or authority entitled to receive it. No acceptance or other action on the

part of the latter, in the absence of a statute requiring it, is necessary to vacate the office resigned.

*State v. Mayor, etc.*, 4 Neb., 260.
*State v. Hanss*, 43 Ind., 105.
*State v Fitts*, 49 Ala., 402.
*Gates v. Delaware Co.*, 12 Iowa, 405.
*United States v. Wright*, 1 McLean, 509.

A vacancy must exist before an election to fill it can be ordered.

Dillon on Mun. Corp. (3d ed.), sec. 222.
*Lindsay v. Luckett*, 20 Tex., 516.
*Biddle v. Willard*, 10 Ind., 62.
*People v. Wetherell*, 14 Mich., 48.

Now then, if a resignation can create a vacancy only upon the election and qualification of a successor, then it would be impossible to create a vacancy at all by resignation; because, until the vacancy in fact exists, the election of a successor cannot be ordered, and of course no successor could be elected. This consideration alone is sufficient to show that the taking effect of a resignation cannot be deferred until the qualification of a successor.

So that even without the statute of 1871, the resignation took effect and vacated the office immediately upon its being filed with the clerk, without regard to any action of the council thereon. But in this case the resignation was duly accepted by the council and their acceptance duly entered on the record. So that there can can be no question that this resignation took effect when made, April 10, 1882.

3. The general statutes in force at and ever since the time the bonds were issued, provided that resignations should take effect upon being made to the proper authority.

Section 2, chap. 11, R. S., 1849, Sec. 2, Chap. 14, R. S., 1858, and Sec. 962, R. S., 1878, provide as follows:

"*Every* office shall become vacant *on the happening of either of the following events, before the expiration of the term of such office*":

1. The death of the incumbent.
2. *His resignation.*
3. His removal.
4. His ceasing to be an inhabitant of this state, or, if the office be local, his ceasing to be an inhabitant of the district, county, town, *city* or village for which he shall have been elected or appointed, or within which the duties of his office are required to be discharged.
5. His conviction of an infamous crime, or of any offense involving a violation of his official oath."

It will thus be seen by the very wording of the first clause of this section, that the object of a resignation is to create a vacancy in the office, or put an end to the incumbent's official life "*before the expiration of the term of such office,*' and is to create the vacancy "on the happening of the resignation." It is likewise apparent that if the resignation, when properly made, does not create a vacancy, then neither does the death, removal, ceasing to be an inhabitant, or conviction of the incumbent; but that in either event the vacancy does not occur until the expiration of the incumbent's term or the election and qualification of his successor. Such a construction of the statute, we submit, could not be tolerated for a moment.

But any possible doubt there might be as to when the mayor's resignation shall take effect, is removed by Sec. 2, chap. 204, P. & L. Laws, 1871, which provides:

"The resignation of the mayor shall be in writing, directed to the common council or city clerk and filed with the city clerk, *and shall take effect from the time of filing the same.*"

This statute very properly recognizes the right of the mayor to resign as already existing, and simply regulates the manner of its exercise and the time of its taking effect.

Here is the positive, unequivocal declaration of the legislature that the resignation "shall take effect from the time of filing the same." With this positive statute before it, the court cannot say that it does not take effect until some indefinite time after, and the happening of some other event.

It is certainly a proper exercise of legislative power to prescribe by statute when a resignation shall take effect. Whatever argument therefore might be constructed for plaintiff without the statute, the statute itself puts an end to all argument; for, *ita lex scripta est.*

But there is another consideration that removes this question from all doubt. Sec. 6 of the charter (chap. 327, P. &. L. Laws 1856), provides: "All elective officers, except justice of the peace and aldermen, shall, *unless otherwise provided*, hold their respective offices for one year and until their successors are elected and qualified." So that if it was *otherwise provided*, the mayor did not hold his office for one year or until his successor was elected and qualified. It was so otherwise provided by sec 2, chap. 11, R. S., 1849, which provided that his office should become vacant upon the happening of his resignation.

Thes words, "unless otherwise provided," mean not only as was then otherwise provided, but as might thereafter be otherwise provided. They are in themselves a reservation to the legislature of the right to change and further regulate the mayor's tenure of office.

## II.

**Neither chap 61, P. & L. Laws 1867, nor sec. 2, chap. 204, P. & L. Laws 1871, violates sec. 10, Art. 1, Constitution of United States, or sec. 9, Bill of Rights of Wisconsin.**

1. The only ground upon which it is claimed these statutes conflict with the constitutional provision cited is, that at the time the bonds were issued, the mayor of the city of Watertown was not authorized by law to resign his office, and that conferring upon him that right after the issuing of bonds, impaired the obligation of the contract. If, therefore, the mayor was authorized to resign at the time the bonds were issued, it is very clear these statutes do not conflict with any provision of the constitution; and we now proceed to show that he was authorized by law to resign at the time the bonds were issued and ever since the city was first chartered.

(a.) By the *Common Law* the mayor was so authorized to resign his office.

All municipal officers were authorized to resign at common law; but the resignation did not take effect until it was accepted. In this case the proofs show a full and complete acceptance by the council before the resignation of the junior aldermen. Hence, not only was the mayor in this case authorized to resign by the common law at the time the bonds were issued, but the proofs show a full and complete common law resignation, including the formal acceptance thereof entered upon the record.

Dillon Mun. Corp. (3rd ed.), Sec. 224 and cases cited.

Where no particular mode is prescribed, neither the resignation nor acceptance thereof need be in writing or in any particular form of words. The acceptance may be by

entry in books, by vote or resolution, or by treating the place as vacated.

Dil. on Mun. Corp. Sec. 224, last clause and note to same.

Also note 4 to Sec. 224, page 249.

*Page v. People, 50 Ill., 432.*

So that a common law resignation is complete without any writing, if only there be declared by words a present intent and desire on the part of the officer to resign, and the acceptance is evidenced by any word or act on the part of the accepting authority.

(b.) By the statutes then existing the mayor had full authority to resign at the time the bonds were issued.

Sec. 1 of Chap. 11, R. S., 1849, provides:

"Resignations shall be made as follows:

1. By the governor and lieutenant governor to the legislature.

2. By other state officers to the governor.

3. By senators and assemblymen to the presiding officer of their respective houses, who shall immediately transmit the same to the governor, and to the gevernor during the recesses of the legislature.

4. *By all other officers who hold their offices by election* except officers elected at town meetings, *to the officer or officers respectively authorized by law to order a special election to fill such offices respectively.*"

This section has remained in force since 1849.

Sec. 1, Chap. 14, R. S. 1858.

Sec. 961, R. S., of 1878.

Here is the direct statutory authority for *all officers* to resign. And "*all other officers*" mentioned in the above subdivision 4, includes the mayor and aldermen of the city of Watertown. The exception of town officers only makes this the more clear. *Expressio unius est exclusio alterius.*

Then, Sec. 2, Chap. 11, R. S., 1849, provides that "*every* office shall become vacant on the happening of either of the following events before the expiration of the term of such office: 1. The death of the incumbent. 2. His resignation," etc.

It will be noted that by this section "*every office*" is to become vacant before the expiration of the term by the happening of, among other things, the resignation of the incumbent. "*Every office*" includes all city offices, and the officers of the city of Watertown. If there could be a possible shadow of a doubt on this subject, it is removed by subdivision 4 of said Sec. 2, which provides that a vacancy shall be created by the incumbent's "ceasing to be an inhabitant of the state, or *if the office be local*, his ceasing to be an inhabitant of the district, county, town, *city*, or village for which he shall have been elected or appointed, or within which the duties of his office are required to be discharged."

This statute, in substantially the same form as it appears in the revision of 1849, has remained in force up to the present time.

Sec. 2, Chap. 14, R. S. of 1858.
Sec. 962, R. S. of 1878.

Here this first section authorizes *every elective* officer to resign by making his resignation "to the officer or officers respectively authorized by law to order a special election to fill such offices respectively." Then the second section declares, what effect a resignation so made shall have: it shall vacate the office. "*Every* office shall become vacant on the happening of either of the following events before the expiration of the term of such office. 1. The death of the incumbent. 2. *His resignation*," &c. Can it be doubted for a moment what resignation is meant here? It can be no other than that already prescribed in the preceding section 1—a resignation made simply as therein designated, one not requiring any acceptance or any other act to give it validity. So that the statutes in force at

the time the bonds were issued, not only authorized all city officers to resign, but provided the offices should become vacant upon the officers making their resignations to the authorities named. No acceptance or other act was required to vacate the office. But the mere making of the resignation by the officer, *ipso facto*, vacated the office.

Under each of these revisions of the laws of Wisconsin the resignations of all officers other than state, legislative and town, were required to be made to the officer or officers authorized to call a special election to fill the vacancy. The common council in the city of Watertown is the "officer or officers" authorized by the charter to call special election to fill vacancies in the office of mayor or alderman.

Sec. 40, Chap. 45, P. & L. Laws, 1853.
Sec. 7, Chap. 327, P. & L. Laws, 1856.
Sec. 7, Chap. 233, G. L., 1865.

Sec. 2, chap. 204, P. & L Laws, 1871, requires the mayor's resignation to be made to the common council or city clerk. This statute therefore so much inveighed against by the plaintiff does not change the law governing the resignation of mayor of the city of Watertown in any material respect from what it was at the time the bonds were issued. Hence there can be no possible reason for holding that statute void.

2. The charter provided in express terms that it might "be amended, altered or repealed by the legislature."

Sec. 58, Chap. 45, P. & L. Laws, 1853.

This is simply a re-expression of the same reservation of power by the legislature contained in sec. 1, art. 11, Con. of Wis.

The doctrine is well settled that where this right is reserved, either in the charter, constitution or general law, its exercise cannot be urged by any person, creditor, or otherwise, as impairing the obligation of a contract. The act of 1871 was simply an amendment to the charter, and comes within the principle here asserted.

Sherman v. Smith, 1 Black, 587.
Pennsylvania College Cases, 13 Wallace, 190.
Miller v. State, 15 Wallace, 478.
Holyoke Co. v. Lyman, 15 Wallace, 500.
Olcott v. Supervisors, 16 Wallace, 678.
West Wis. R. R. Co. v. Supervisors, 35 Wis., 257.
Attorney-Gen. v. R. R. Co.'s, 35 Wis., 425, from page 562 to 579.

In these two cases in 35 Wis., the cases on this subject are collated and commented on with the utmost discrimination and judgment.

This rule applies not only to the original corporators and corporation, but to all creditors and other persons who have entered into contract or other relations with them.

In *Tomlinson v. Jessup*, 15 Wallace, 454, a stockholder in a railroad company, incorporated in 1851 by the state of South Carolina, filed his bill against certain of the state officers to enjoin them from levying a tax upon the property of the road. At the time, a general law of the state provided that every charter of a corporation might be amended, altered or repealed by the legislature. In 1855 the charter was amended by exempting from taxation the company's stock and real estate. The constitution of the state, adopted in 1868, subjected the property of corporations to taxation, and, pursuant to subsequent legislation, the stock and property of the railroad company was taxed. It was claimed that this legislation impaired the obligation of the

contract, not only between the state and the company, *but also between the company and its stockholders.* On this latter point the court says:

"It is true that the charter of the company, when accepted by the corporators, constituted a contract between them and the state, and that the amendment when accepted, formed a part of the contract from that date, and was of the same obligatory character, and it may be equally true, as stated by counsel, that the exemption from taxation added greatly to the value of the stock of the company, and induced the plaintiff to purchase the shares held by him. But these considerations cannot be allowed any weight in determining the validity of the subsequent taxation. The power reserved by the state by the law of 1841 authorized any change in the contract, as it originally existed or as subsequently modified, or its entire revocation. The original corporators, or *subsequent stockholders*, took their interests with knowledge of the existence of this power, and of the possibility of its exercise at any time, in the discretion of the legislature. The object of the reservation, and of similar reservations, in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise, if the public interests should at any time require such interference. It is a provision intended to preserve to the state control over its contracts with its corporators, which, without that provision would be irrepealable, and protected from any measure affecting its obligations."

In *West Wisconsin R. R. Co. v. Supervisors*, 35 Wis., 256, the company had sold several million dollars of its bonds secured by mortgage on its lands, mainly by reason of the exemption of lands from taxation. Afterwards the act exempting the lands was repealed, and it was claimed this act impaired the obligation of the contract between the company and the bondholders. But the court says on page

271: "The original corporators, or subsequent stockholders, or bondholders, took their interests with knowledge of the existence of this reserved right on the part of the state of repealing the exemption acts, and of the possibility of its exercise at any time in the discretion of the legislature. A repeal of the act of incorporation would likewise effect the value of the bonds and of the security. But this consideration could have no weight in determining the question whether the legislature might not revoke or change its own grant of corporate rights. Suppose the provision exempting the lands from taxation for ten years, on condition that the company should complete its road in two years, had been included in its charter, would this render the charter any more sacred or inviolable, or place it beyond the reach of the reserved power contained in the constitution? It seems to us very plain that it would not. The whole charter would still be subject to revocation or alteration at the will of the legislature, *and the fact that the rights of bondholders would be incidentally affected by the exercise of this power on the part of the legislature could make no difference.* The matter would still be within the control of the legislature, although that result might follow from its act withdrawing the corporate grant.

In *Attorney General v. R. R. Co.'*, 35 Wis., 425, defendant's charters granted them expressly the power to take toll without any express limitation. Afterwards chapter 703, of the Laws of 1874, was passed, fixing *maximum* rates of toll for defendants, and much less than they had before charged. The proof showed defendants could not operate their roads under this act and pay their operating expenses and any interest to their bondholders or dividends to their stockholders. Hence it was claimed the act of 1874 impaired the obligation of the contract between the companies and their bondholders. But the court on this point says (p. 578): "Of the same type is the argument that chapter 273

violates the contracts of these defendants with their creditors. This position appears to us to rest in the absurdity that the mortgagor can vest in his mortgagee a greater estate than he had himself. Perhaps the statute may lessen the means of payment of the defendants. So would a fine for homicide, under the police power of the state. But to lessen the means of payment of a contract is not to impair the obligation of the contract. These defendants took their franchises, *and their creditors invested their money, subject to the reserve power, and suffer no legal wrong when that is exercised.*"

Hence when the plaintiffs purchased the bonds of the city of Watertown they did so with full knowledge and in view of the fact that the legislature had reserved the power to repeal, alter or amend any provision of the city charter. That reserved power was as efficacious and binding on the plaintiffs as if it had been recited in the bonds themselves, and thereby in fact became a part of the contract between the plaintiffs and the city. The plaintiffs cannot, therefore, complain at the exercise of a power their contract in effect provides may be exercised, "and suffer no legal wrong when that is exercised."

3. But without the reserved power of the legislature and the fact that the right to resign co-existed with the issue of the bonds, still the statutes complained of did not violate the constitutional provision relating to the impairment of contracts.

These statutes (the last clause of section 1, chap. 61, P. & L. Laws of 1867, and last clause of section 2, chap. 204, P. & L. Laws of 1871), recognizing the right to resign as existing, simply regulate the manner of its exercise, and declare when the resignation shall take effect. But concede the broader construction that they confer the right to resign, as claimed by plaintiff, and the same result follows. The right or power of city officers to resign does not form any part of the obligation of the contract between the city and

its creditors. No court has ever yet held or even intimated that the constitutional provision extended so far as to prevent state legislatures conferring upon the officers of municipal corporations of their own creation the right to resign, regulating the manner of making such resignations, and declaring when they shall take effect. State legislatures may confer upon officers of municipal corporations additional rights and privileges, and impose upon them additional duties without incurring the imputation of impairing the obligation of contracts. It is only when they *take from those officers powers and privileges already possessed by them*, not when they increase those powers and privileges, that there can be the least shadow of cause for complaint. The idea that conferring on these officers additional powers and privileges, all usual and reasonable in themselves, is a violation of the constitution, is monstrous doctrine as it seems to us.

The city enters into numberless contracts each year for the construction and repair of its streets and sidewalks, its bridges, school houses and engine houses, and other necessary things. And yet, is it to be held that the making of either one of these contracts strips the legislature of the power to authorize the mayor to resign? It seems to us clearly not. The regulation of such internal municipal concerns does not come within the interdict of the constitution.

In *Perkins v. City of Watertown*, 5 Biss., 320, it was urged that as the original charter provided service might be made upon the mayor *or clerk*, a subsequent statute passed after the issue of the bonds, requiring it to be upon the mayor alone, impaired the obligation of the contract and was void. But the court held it was not and said: "It was urged that by the original charter service of process might be upon the mayor or clerk, and that the legislature could not alter the charter in that respect after the issue of the bonds. That point we do not think well taken. It was not a part of the contract in any sense, and the legislature could prescribe a

different mode without impairing the obligations of the contract."

But these statutes do not even injuriously effect the remedy, much less impair the obligation of the contract.

Von Baumbach v. Bade et. al., 9 Wis., 559.
State v. Hundhausen, 23 Wis., 508.
State v. Hundhausen, 24 Wis., 196.

These Statutes must be held valid under the principle announced by the supreme court of the United States in the following cases:

Louisiana v. New Orleans, 102 U. S., 203.
Greenwood v. Freight Co., 105 U. S., 13.
In Re Penniman, 103 U. S., 714.

4. The foregoing considerations also show that these acts are not in violation of Sec. 9 of the Wisconsin Bill of Rights, as like rules of construction apply to it and the provision of the U. S. Con. relating to the impairment of the obligation of contracts. We shall therefore enter into no separate argument on that section here.

## III.

But that the statutes complained of are valid, and that the resignation of the city officers take effect from the time of the filing thereof, is *res adjudicata* in this court.

In the case of *Rees v. City of Watertown*, 19 Wall., 107, a peremptory writ of mandamus was issued from the United States circuit court for the District of Wisconsin, commanding the Mayor and aldermen of the city to levy a tax to pay a judgment against the city on its railroad bonds. In 1869 alias writ was issued, and in 1870 pluries. A majority of

the aldermen resigned in each instance after the writ was issued and before it was served, except that they did not resign in 1869 until after the alias writ was served upon them.

The circuit court held the resignations valid in each instance, and that a majority of the aldermen having thereby vacated their offices, it was powerless to order the remaining minority to levy the tax.

In 1872 a bill was filed in that case, which came here on writ of error, to have the marshal appointed to levy the tax. The plaintiff set up among other things his efforts to collect his judgment by mandamus, and how they had been thwarted by the city officers resigning, and among other acts complained of in the bill is Chap. 61, P. & L. Laws 1867, which it alleges "provides that any officer may resign by a writing addressed to the mayor, and that such resignation *shall take effect from the time of filing the same.*" It was then claimed that these acts had destroyed plaintiff's remedy at law by mandamus, and the equitable powers of the court were invoked to appoint the Marshal to levy the tax. Yet this court held that notwithstanding these statutes and the artifices and devices of the defendant: "The *remedy* is in law and theory *adequate and perfect.* The difficulty is in its execution only. The want of a remedy and the inability to obtain the fruits of a remedy, are quite distinct, and yet they are confounded in the present proceeding." And the court there decides the case upon the theory that the statute providing for the resignation was valid.

Rees v. City of Watertown, 19 Wall, 107.

## DEFENDANT'S ARGUMENT ON MOTION TO DISMISS WRIT.

This court has no jurisdiction of the cause for the reason that the order of the Circuit Court (page 67) setting aside the judgment, is not a "final judgment" within the meaning of the statute (Sec. 691, R. S.) authorizing the court to review such judgments upon writs of error, and the writ should therefore be dismissed.

The rule for determining whether a judgment or decree is final within the meaning of the statute is stated by this court as follows:

> "The rule is well settled and of long standing, that a judgment or decree, to be final, within the meaning of that term as used in the Acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered. * * *
>
> If the judgment is not one that disposes of the whole case upon the merits, it is not final"
>
> *Bostwick, Receiver, etc., et al. v. Brinkerhoff*, 16 Otto, 3.

The many cases in this court establishing that rule are cited in that case and need not be repeated here.

Did the order setting aside the judgment "terminate the litigation between the parties on the merits of the case?" It seems to us not. The merits of the case were not at all involved in that order or in the determination of the court resulting in it. The order is in no sense a judgment, final or interlocutory, but is simply an interlocutory order, leaving the plaintiffs to take further proceedings in the court below to "terminate the litigation between the parties on the merits of the case."

*Dainese v. Kendall*, 119 U. S., 53.
*Parsons v. Robinson*, 122 U. S., 112.
*Burlington, C. R., etc., Railway Co. v. Simmons*, 123 U. S., 52.
*Benjamin v. Dubois*, 118 U. S., 46.
*Louisiana Bank v. Whitney*, 121 U. S., 284.

We are aware that this court holds that a decision that terminates the litigation on the merits will be held a final judgment, though it be technically designated an interlocutory order. It was so held in *The Board of Commissioners of Tippecanoe County v. Lucas*, 3 Otto, 108. But there the order in fact dismissed the complaint on the merits and left nothing further to be done in the lower court, and for that reason this court held the decision, when reduced to form and entered in the records of the court, a final judgment subject to review here.

GEO. W. BIRD,
DANIEL HALL,
*Attys. for Deft. in Error.*